2-13

stillo, Jose - EBSA

From: Kay, Jonathan - EBSA
Sent: Friday, November 03, 2006 6:57 PM
To: Castillo, Jose - EBSA
Subject: RE: Local 12 Annuity Fund

Let's talk on Monday.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Friday, November 03, 2006 5:27 PM
To: Kay, Jonathan - EBSA
Cc: Langone, Nichelle - EBSA
Subject: Local 12 Annuity Fund

For the record

Jon,

It's amazing that when I presented the facts below to our senior investigators a couple of them are also CPAs. They absolutely agreed with me while Goldberg and Gaynor, which I always questioned their roles behave life the defense counsels for the trustees and Schulthies & Pannettiere.

This email is necessary since I have a have a ongoing EEO complaint and Goldberg and nor are included.

response by Local 12 trustees is in. The issue below is not addressed. The document I obtained from New York Benefit Life which shows the issue below is off course not included.

Now we know the status or what happen to part of the year 2000 investment earnings. The investment earnings for 2000 was $1,871,978 according to the 2000 audited financial statement.

The letter dated June 19, 2001 from New York Benefit Life (attached) shows that the investment earning from 9/1/2000 to 12/31/2000 is $374,768. This money was put into the suspense account and by 10/19/2001 it amounted to about $380,000.

The letter dated October 30, 2006 and the enclosed attachments explain what happen to this money (See attached).

Summary:

On September 26, 2001 Al Wassell, the plan administrator instructed New York Benefit Life to use this money as employer contribution.

The total employer contributions for the period from January 2001 to April 1, 2001 is $1,555,604.77 (See attached listing). Al Wassell stated on his letter that the period is from January to May 2001. Employer contribution statement of Henry Schroeder shows that the period covered by this amount is from January 2001 to April 1, 2001.

The attached wire instruction shows that $1,174,505.47 was transmitted to New York Benefit Life and the September 26, 2001 letter by Al Wassell instructed that the investmen ings which was by then amounted to $381,099.30 would be used as the additional amount ake the total of $1,555,604.77.

$1,174,505.47 plus $381,099.30 = $1,555,604.77

The May 18, 2006 interview of Al Wassell shows that he stated the year 2000 investment earning of $1,872,000 was probably allocated in 2001 but further stated that James of

AM-13

Heinzman of Schultheis & Panettieri should be able to provide the answer.

June 29, 2006 interview of James Heinzman shows that he stated the earnings was located in August 2004.

responded to my telephne inquiry stating that he and the membership was not informed that part of the 2000 investment earnings was used as an offset to the employer contributions for the period. He also emailed me his more detailed response.

Review of the minutes of the trustees meetings show no information that this "offset" was discussed.

Mr. 's employer contributions account statement shows that the January 7, 2001 until April 1, 2001 total is $2,864.40. These contributions were transmitted by employers (1)' and (2) .

Mr. 's Annuity Fund account statement shows that in 10/19/2001, employer contributions of $2,864.40 was entered into his account.

The attached employer contributions listing shows that Schroeder is entitled to $2,864.40 contributions.

Based on the facts showed above, there are now two major issues I see as extremely serious fiduciary breach.

1) The investment earnings of $374,768 which increased to $381,099.30 by October 19, 2001 because of interest is still not allocated. This money was used for something else. The interest is due up to this date (November 3, 2006.).

2) What happen to the employer contributions from January 2001 to April 2001 of $381,099.30????????

Did this be conversion under Section 664?

It's beyond the statue.

Respectfully.

2-14

stillo, Jose - EBSA

rom: Kay, Jonathan - EBSA
Sent: Tuesday, November 07, 2006 12:12 PM
To: Castillo, Jose - EBSA
Subject: Local 12 Asbestos Workers investigation

Jose:

As we discussed earlier today, effective immediately, I am directing that you:

1) Not initiate contact with anyone in the Office of Enforcement, Mr. Lebowitz's office or Brad Campbell's office regarding your views/opinions on the issues in this case. If you believe that you have a need to contact any such individuals on the merits of the case, please see me.

2) Not contact Mr. without prior approval from Group Supervisor Robert Goldberg or Deputy Regional Director Jeff Gaynor.

3) Not contact representatives of the Local 12 Funds, including their counsel and accountants, without prior approval from Group Supervisor Robert Goldberg or Deputy Regional Director Jeff Gaynor.

If, as you mentioned, you have a need to bring EEO issues to someone's attention, there are appropriate people that you can contact.

se advise me whether 1) you understand the three directions I have given you in this e-mail and 2) you nd to comply with each direction.

Finally, by e-mail earlier today I requested that you tell me whether you sent copies of your Nov. 3 Local 12 email addressed to me and cc'd to Nichelle Langone to any individuals in OE. You said that you would indicate whether you would provide me with a response once you received this email.

I again want to assure you that this office supports your development of the issues in this case wherever they may lead.

14

2-15

stillo, Jose - EBSA

om:	Briglia, Michael - EBSA
Sent:	Wednesday, January 17, 2007 10:42 AM
To:	Alvarez, Irma - EBSA; Blonski, Walter - EBSA; Briglia, Michael - EBSA; Castillo, Jose - EBSA; Maddi, Ivette - EBSA; Miller, Tamar - EBSA; Schildkraut, Robert - EBSA; Teper, Rachelle - EBSA
Cc:	Langone, Nichelle - EBSA
Subject:	Reminders & miscellaneous

(1) Locator - please sign the locator sheet so that we know your whereabouts.

(2) Leave slips - please give them to either myself or Rachelle - we will have them approved.

(3) We have ordered the 2005 Code & Regulations books for the whole track - please let me know if you **don't** need a set.

stillo, Jose - EBSA

From: Briglia, Michael - EBSA
Sent: Wednesday, January 17, 2007 12:09 PM
To: Alvarez, Irma - EBSA; Blonski, Walter - EBSA; Briglia, Michael - EBSA; Castillo, Jose - EBSA; Miller, Tamar - EBSA; Schildkraut, Robert - EBSA; Teper, Rachelle - EBSA
Cc: Langone, Nichelle - EBSA; Kay, Jonathan - EBSA
Subject: My schedule

I will be on leave this afternoon, January 17.

I plan to be in the office for the remainder of this week and all of next week.

'tillo, Jose - EBSA

rrom: Briglia, Michael - EBSA
Sent: Friday, January 19, 2007 2:51 PM
To: Castillo, Jose - EBSA

Please come see me when you get a chance!

ɜtillo, Jose - EBSA

rrom:	Briglia, Michael - EBSA
Sent:	Friday, January 26, 2007 7:38 AM
To:	Alvarez, Irma - EBSA; Blonski, Walter - EBSA; Castillo, Jose - EBSA; Maddi, Ivette - EBSA; Miller, Tamar - EBSA; Schildkraut, Robert - EBSA; Teper, Rachelle - EBSA; Langone, Nichelle - EBSA
Cc:	Kay, Jonathan - EBSA; Gaynor, Jeffrey - EBSA; Licetti, Thomas - EBSA; Jacobello, Peter - EBSA; Sterlacci, Mona - EBSA; Stecher, Richard - EBSA
Subject:	My Schedule

I will be on leave on Monday & Tuesday, January 29 & 30. I plan to be in the office for the rest of the week.

2-16

stillo, Jose - EBSA

From: Kay, Jonathan - EBSA
Sent: Wednesday, May 02, 2007 1:39 PM
To: Castillo, Jose - EBSA; Goldberg, Robert - EBSA
Subject: RE: Local 12 Funds ROI

Follow Up Flag: Follow up
Flag Status: Red

I agree with you that there is a big difference between create and locate. I, not Bob made, the change. I'm willing to review this again. Can you give me a copy of heinzman's and wassell's RI. Also, didn't Heinzman/Kaplan or Wassell contend, at least, that while there was no supporting documentation when the invoice was initially presented, there was some support provided to the plan at a later date?

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Wednesday, May 02, 2007 8:36 AM
To: Goldberg, Robert - EBSA; Kay, Jonathan - EBSA
Subject: Local 12 Funds ROI

Gentlemen:

For the record.

On VC Letter issue #8

intial ROI was written to read that Heinzman stated he would create the supporting documents for invoices paid in June 2001. He stated this on his interview dated 7/19/2004. He, in fact created the supporting documents on August 3, 2004, over three years later, and mailed it to us.

There is a huge difference between creating the documents after the fact and after discovery by investigation and simply locating it because it may have been misplaced.

The supposed final ROI edited by both of you states Heinzman would locate the supporting documents.

The Fund Administrator acknowledged on his interview that there was no supporting documents when he paid these invoices.

Thanks

stillo, Jose - EBSA

From: Castillo, Jose - EBSA
Sent: Wednesday, May 02, 2007 3:02 PM
To: Kay, Jonathan - EBSA
Subject: RE: Local 12 Funds ROI

For the record:

There was no supporting document except the one Heinzman created more than three years later. It was during the subsequent settlement meetings that Heinzman changed his story at least twice and stated that he located the supporting document.

As you observed, Heinzman changed his story on the investment analysis documents also. Again on this issue, Bod Goldberg also told me that maybe Heinzman misunderstood me and Bob Trujillo during the interview.

His statements was accepted by Bob Goldberg and Bob stated to me that maybe Heinzman misunderstood me and possibly Bob Trujillo during the interview. Also, after one of these settlement meetings that Bob Goldberg told me that all my evidence on the S & P issues are flimsy at best and should be eliminated.

Thanks

---Original Message-----
From: Kay, Jonathan - EBSA
Sent: Wednesday, May 02, 2007 1:39 PM
To: Castillo, Jose - EBSA; Goldberg, Robert - EBSA
Subject: RE: Local 12 Funds ROI

I agree with you that there is a big difference between create and locate. I, not Bob made, the change. I'm willing to review this again. Can you give me a copy of heinzman's and wassell's RI. Also, didn't Heinzman/Kaplan or Wassell contend, at least, that while there was no supporting documentation when the invoice was initially presented, there was some support provided to the plan at a later date?

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Wednesday, May 02, 2007 8:36 AM
To: Goldberg, Robert - EBSA; Kay, Jonathan - EBSA
Subject: Local 12 Funds ROI

Gentlemen:

For the record.

On VC Letter issue #8

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in fact created the supporting documents on August 3, 2004, over three years later,
mailed it to us.

There is a huge difference between creating the documents after the fact and after discovery by investigation and simply locating it because it may have been misplaced.

The supposed final ROI edited by both of you states Heinzman would locate the supporting

documents.

: Fund Administrator acknowledged on his interview that there was no supporting .ocuments when he paid these invoices.

Thanks

2-17

Report of Interview

U.S. Department of Labor
Employee Benefits Security Administration

A phone interview of Mr. , phone no. was held on September 5, 2007 at the Employee Benefits Security Administration office by Investigator Jose Castillo.

Mr. provided the following information:

He stated that he is an active member of Local 12 Asbestos Workers Union since 1971. He stated that he is not retired.

He stated that there was no written notification concerning any shortfall of the Annuity Fund's asset. He further stated that he learned of the shortfall on rumors.

He stated that there was no official announcement during general meetings of the shortfall.

He stated that on August 16, 2007, he went to the Funds' office to pick up a vacation check.

He stated that Al Wassell, the plan administrator said to him that you and and some of your friends are getting me in trouble by your phone calls to the Department of Labor.

He stated that Al Wassell knows that is his ( ) friend.

He stated that it was his understanding that he must be anonymous when he called DOL about four months ago to question about the allocation of his share of the year 2000 investment earnings of the Annuity Fund. He further stated that he does not understand why it appears that the Mr. Wassell knows that he called DOL.

By: Jose Castillo, Investigator
At: New York Regional Office
EBSA

Date Prepared: Sept. 5, 2007
Case NO. 30-099939 (48)
30-099940 (48)
30-100218 (48)
30-100460 (48)
30-100551 (48)

17

Report of Interview

U.S. Department of Labor
Employee Benefits Security Administration

A phone interview of Mr. , phone no. was held on August 28, 2007 at the Employee Benefits Security Administration office by Investigators Jose Castillo.

Mr. provided the following information:

He stated that he is retired member of Local 12 Asbestos Workers Union. He stated that he was in the Annuity Fund.

He stated that he was an active member in 2001 and just retired about one and half years ago.

He stated that since 2001 there was a strong rumor that there was a shortfall on the Fund's money due to the misdeeds of the former plan administrator and accountant.

He stated that the membership was not officially informed of this shortfall. He further stated that no letters were mailed to the membership informing them of the shortfall.

He stated that on April 2004 meeting at the Radisson Hotel, the membership was told by James Heinzman, the accountant that the insurance settlement would cover for the shortfall.

He further stated that Mr.Heinzman was doing the presentation on the podium at the Radisson Hotel.

By: Jose Castillo, Investigator
At: New York Regional Office
EBSA

Date Prepared: Aug. 28, 2007
Case NO. 30-099939 (48)
30-099940 (48)
30-100218 (48)
30-100460 (48)
30-100551 (48)

Report of Interview

U.S. Department of Labor
Employee Benefits Security Administration

A phone interview of Mr. was held on August 24, 2007 at the Employee Benefits Security Administration office by Investigators Jose Castillo.

Mr. provided the following information:

He stated that the equation or formula on how the misallocation of the investment earning from 1990 to 1999 was never really explained to the membership.

He stated that the plan administrator (Al Wassell) did not provide the membership with a formal letter or notification that the Annuity Fund's actual assets was less than the participants' account balance back in 2000 to 2001.

He stated that the membership got the word that there was a sort of a shortfall in the Fund's assets and missing funds by means of rumors.

He stated that the membership thinks during that time that the shortfall is the result of the alleged illegal activities of the former plan administrator and the former accountant.

He stated that the trustees informed the membership of the civil suit that was filed but only in general terms. The complaint was only read once to the membership and we were told that it will not be repeated and no question of any kind would be entertained. He further stated that the Secretary of the Union during the time, Sal Gargulio read the document.

He stated that the reading of the civil suit was done in one of the membership general meeting on the early part of 2002. He further stated that no letters were mailed to all the members regarding this civil suit. He further stated that it means that only the members that were present on that meeting received this information.

By: Jose Castillo, Investigator
At: New York Regional Office
EBSA

Date Prepared: Aug. 27, 2007
Case NO. 30-099939 (48)
30-099940 (48)
30-100218 (48)
30-100460 (48)
30-100551 (48)

2-18

U.S. Department of Labor

Employee Benefits Security Administration
33 Whitehall St., Suite 1200
New York, NY 10004
Phone: (212) 607-8600
Telefax: (212) 607-8681

December 3, 2007

To: Patricia M. Rodenhausen
Regional Solicitor

From: Jonathan Kay JK
Regional Director

Re: Local Union 12 Asbestos Workers Annuity and Welfare Funds
EBSA Case Nos.: 30-099939(48) and 30-099940(48)

Enclosed please find a supplemental Report of Investigation (ROI) and supporting exhibits in the above matters. As you are aware, by memo dated May 4, 2007 we referred an action ROI addressing fiduciary breaches that involved the above-referenced plans and three other affiliated funds. The issues raised in the May 4, 2007 transmittal have been analyzed by NYRSOL. The instant ROI describes four additional series of transactions, the first three of which are limited to the Annuity Fund, while the fourth one concerns the Welfare Fund.

Background

By way of background, in or about 2000 the Annuity Fund trustees decided that they would convert to a self-directed plan which would allow participants to self-direct their own investments. Simultaneously, the Annuity Fund selected New York Life as the custodian of the Annuity Funds assets which exceeded 45 million dollars.

Immediately prior to the conversion to a self-directed plan, the Annuity Fund contends that it discovered that 1) Fund Administrator, Jerome Market, may have diverted money from the Fund and 2) throughout the 1990s earnings on the Annuity Fund's investments may have been improperly allocated to individual participants accounts. According to the Annuity Fund's trustees, the improper allocations resulted in over- or understatement of participants' accounts. The situation was aggravated by the fact that some participants whose accounts were overstated received distributions during the 1990s and excessive benefit payments were not recouped from these individuals. Again, according to the trustees, the diversions and mismanagement resulted in the amount of Annuity Fund assets available for immediate investment as of December 31, 2000 being approximately $1.9 million less than the then current participants' account balances which balances did not reflect the year 2000 investment earnings.

At the same time the Trustees were sorting out the account balances, with the help of the Schulteis and Panettieri accounting firm, the Annuity Fund's trustees had to decide how to allocate the Annuity Fund's investment earnings for 2000 which are reported as $1.8 or $2

18

million in different places. According to the trustees, the $1.9 million shortfall between assets on hand and participants' account balances was made up by the $1.8 million in 2000 earnings which enabled the Annuity Fund to "go live" with the self-directed accounts at New York Life in June 2001. The trustees readily admit that the 2000 earnings were not allocated to individual participants' accounts in 2001. Rather, the trustees contend that the earnings were not allocated until 2004, subsequent to resolution of a lawsuit the trustees initiated in May 2002 against former Plan Administrator, Jerome Market, and others. The lawsuit resulted in separate payments by fidelity and fiduciary carriers as well as defendants that totaled approximately $1.3 million. Upon receipt of these funds the trustees state that the 2000 earnings could, and were, finally allocated to individual participant accounts. The Trustees admit that no lost opportunity costs, attributable to the delay from 2001 to 2004, were distributed when the 2000 earnings were allocated in 2004.

New Investigative Findings

The new investigative findings are:

1) In September 2001 the new Plan Administrator for the Annuity Fund, Al Wassell, directed New York Life to use $374,768 of the unallocated year 2000 investment earnings (which had grown to $381,099.30 by September 2001) as employer contributions.

   The Fund's trustees contend that the $381,099.30 was actually used to pay plan expenses that had initially been taken out of employer contributions that had been remitted. Despite repeated requests, the Annuity Fund was unable to specify what expenses were at issue.

2) The year 2000 investment earnings of either $1.8 or $2 million were never allocated to individual participants' accounts. The basis for this conclusion is two-fold. First, there is conflicting evidence about whether there actually was a shortfall between the amount of assets the Annuity Fund had in hand and the aggregate amount of all participants accounts. If there was no shortfall, the trustees explanation that they couldn't allocate the year 2000 earnings in 2001, i.e., that they needed the earnings in order for the plan to go self-directed has no merit. Second, the NYRO could not identify an audit trail establishing that the earnings were actually allocated in 2004 as the trustees contend.

3) On May 2, 2002 $421,449.84 of Annuity Fund assets were used to satisfy certain employers' obligations to make contributions to the Annuity Fund.

4) The trustees of the Welfare Fund permitted $1,237,691.50 of Welfare Fund assets to be transferred the Annuity Fund for reasons that are unexplained and thus appear to be improper. The amount was transferred on the three dates in the amounts noted.

June 6, 2001	$489,577.50
November 20, 2001	$431,127.00
January 8, 2002	$316,987.00

Attached hereto is the last in a series of tolling agreements relevant to the above issues. A separate series of tolling agreements have been executed with regard to the issues referred to RSOL in May 2007. The attached tolling agreement tolls the statute of limitations as of July 17, 2006 "with respect to any action ...regarding the allocation of the Annuity Fund's earnings for the year 2000...." The attached tolling agreement expires on December 31, 2007.

The attached tolling agreement encompasses the first two issues discussed in this memo. The NYRO did not have any information about the non-allocation of the year 2000 earnings until it received a copy of a special project report from the Schulteis and Panettieri accounting firm in October 2005 and receipt of a November 7, 2005complaint about the 2000 earnings from participant . The third new investigative finding would be time-barred under the six year rule on May 1, 2008. It would appear that only the January 8, 2002 transfer in the fourth finding is actionable, but absent a tolling agreement, may be barred on January 7, 2008.

Attachments: Tolling Agreement
Enclosures: ROI, Exhibits

2-19

stillo, Jose - EBSA

From: Castillo, Jose - EBSA
Sent: Friday, January 25, 2008 4:51 PM
To: Weekley, Jennifer - SOL; Monhart, Jeff - EBSA
Subject: The issues on Local 12 Annuity Fund

Attachments: Copy of NYBL.pdf; Local 12 - Final Addendum ROI .doc


Copy of NYBL.pdf (65 KB)


Local 12 - Final Addendum ROI ...

Jenny,

I CC this to Jeff Monhart since he got involved on this when he was here as acting deputy. His involvement is as follows:

He suggested that we needed to depose the accountant, James Heinzman of S & P. He also said that during the diposition of Heinzman, we should show him the documents and ask the questions. Bob and myself agreed that it's the best way. However, a few days later, I was informed that Jonathan Kay and Bob decided not to do the subpoena. I asked Monhart if he was made aware of the decision and he said no. I was informed then By Goldberg that he will appear voluntarily. Then about a week later I was again informed by Goldberg that he won't be able to appear and that we can only interview him by phone.

I believe that the only person that can answer questions about Issue no. 2 is James Heinzman. When we did the interview of plan administrator Al Wasell on August. 17, 2007, two counsels, Engel and Golub tried to answer question from me of financial facts that are reflected on the financial statements and Form 5500s. Their responses were useless since both of them does not really know fully well the financial facts on the financial statements. Heinzman's company hired a Washington law firm on his behalf. Copy of the ROI is attached for Jeff Monhart.

As a follow up of yesterday's (1/24/08) session and to further assist you, here are some of the things I can briefly summarized. It should make it a lot easier for you.

On issue Number. 2, that I considered the big one which according to Goldberg yesteday "does not pass the smell of going to court". I presented this issue to Jonathan Kay in May 2006. By this time, Jan. 2008, its nearing the two-year mark. The explanation of both the trustees' counsel and James Heinzman is that by December 31, 2000, there was a shortfall. Meaning that the Fund's asset was less than the participants account balance. This shortfall explanation was first told to us back in June 2006 (Exh. 103B). Since then I requested documents to support that claim. As you know, up to this time, 18 months later, neither Heinzman nor the trustees can provide me with even half a page of a document. We had meetings a few times since then and all I hear were eloquent verbal explanations from their counsels and off course a 13 page letter without documents to explain it. This is a $1.8 million or $2 Million money that they cannot account for, plus interest it's about $4 million now and 500 or so participants were denied of these earnigs. Verbal or written explanation does not mean a thing without documents.

Exh. 104, is the response we received from James Heinzman dated 11/3/2006. Review it and you will find out that page 2 of Appendix 2 shows the audit work paper with his initial. It reflected - TOTAL NEW YORK LIFE ASSETS AS OF 12/31/2000 AS $47,060,934. Also this page shows that as of 12/31/2000 participant account balance is $46,686,166. Make note that the $47,060,934 does not include (1) loan receivables of $2,756,494.00 or $3,807,621.70. (2) three bank accounts outside of New York Life (Fleet Bank 1 and 2 and Citibank).

Now, let's go to Exh. 146. This is the page 2 (same as Exh. 97) of the statement from New York Life dated 6/19/2001. Page two of this statement shows that Fund's asset as fo 12/31/2000 is $47,060,934. This amount agrees with the audit work paper of James Heinzman which is on the exhibit and also on Exh. 104. Exh. 97 also has this statement. Attached

is the New York Life statement.

150,. S & P employee benefit plan audit planning checklist also shows that there was shortfall and page 5 of the audit plan states that there is "NO" unreconciled difference between net assets available for benefits per the trustees or custodian records and the plan's records.

So, where is the shortfall?

And by way, participants' loan receivAbles is always an asset. During our meeting yesterday, the theory that loan receivable may not be included as part of the "NET ASSETS AVAILABLE FOR BENEFITS" to figure out the net asset of the Annuity Fund and then compare it to the total participants account balance of $46,686,166 (Exh.127) is completely wrong. Generally Accepted Acccounting Practice (GAAP) always treat receivables as an asset and in fact the second most current or liqiud asset next to cash and securities. By treating loan receivables as not part of the assets, maybe their alibi that there was a shortfall of assets compared to the participants account balance might FLY.

The reason that I strongly disagree if this issue is not considered as the evidence and facts presented above is because 500 or so blue collar workers were denied their investment earnings.

The shortfall alibi is completely bogus. By not allocating the NET ASSETS AVAILABLE for benefits, the participants did not receive their correct investment earnings. And, all I get from the trustees counsel is a verbal and written explanations.

Page 17 Exh. 148 of the ROI shows that Bob Goldberg emailed the counsels three times requesting to provide the breakdown of fund assets as of 12/31/2000. No response.

HERE'S WHAT WE NEEDED AND ALSO what I NEEDED FROM THEM: "PROVIDE ME WITH DOCUMENTS TO PROVE THAT THERE WAS A SHORTFALL BACK IN 2000. These documents should be able to tradict what I have gathered so far to prove that there was no shortfall. These ments must be obtained from third parties like where I obtained mine. I do not need ther UNDOCUMENTED SPREADSHEET FROM ANYBODY LIKE THE ONE IN Exh. (109)created by Heinzman.

WHAT EVER IS THEIR VERBAL EXPLANATIONS NEXT TIME WE MEET THEM SHOULD BE SUPPORTED BY DOCUMENTS I MENTIONED ABOVE.

It took me a few minutes to gather the hard copy documents to support my claim that there was no shortfall. They are mostly part of the audit work paper. If they have the documents to show that there was "A SHORTFALL", HOW LONG IT WELL TAKE THEM TO PROPVIDE IT TO ME? It is getting closer to two years now and still no documents.

Also Jenny review Exh. 90, Volume 23. It tells you exactly how the allocation of the Net Assets available for benefits is done. It is pretty up to date.

As in the case of Local 12 Annuity Fund, no apportioning of loss took place. Apportioning of the loss would be impossible since there is no loss.

If the allocation of the Fund's net assets was done according to the plan documents, the allocation would have been done based on the net asset available for benefit which is $49,497,552. This amount would be allocated to 500 or so participants based on the proportionate amount of their individual account balance. See Exh. 146B, AICPA Audit and Accounting Guide.

If you have any other questions concernng the Exhibits call me.

Jose

2-20

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Fax 212.969.2900

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January 31, 2008

By UPS Next Day Air
and Electronic Mail

WITHOUT PREJUDICE
COMMUNICATION FOR
SETTLEMENT PURPOSES ONLY

Jennifer D. Weekley, Esq.
U.S. Department of Labor
Office of the Solicitor
201 Varick Street
New York, New York 10014

Re: International Association of Heat and Frost Insulators and Asbestos Workers Local 12 of New York City, AFL-CIO, Pension, Welfare, Annuity, Vacation and Educational Funds , EBSA Case Nos. 30-99939(48), 30-99940(48), 30-100130(48), 30-100460(48), 30-100551(48)

Dear Ms. Weekley:

In accordance with the discussion that took place at the meeting held in your offices on December 14, 2007 with respect to the investigation by the U.S. Department of Labor Employee Welfare Benefit Administration ("EBSA") of the Asbestos Workers Local 12 Benefit Funds (the "Funds") regarding certain issues, we respectfully make this submission on behalf of the Trustees of the Funds (the "Trustees"). This submission is being made for the purpose of attempting to avoid litigation and to present a settlement proposal. In addition, we have set forth herein supplemental information that is intended to assist you in understanding why the settlement proposal is reasonable, and should be accepted by the Office of the Solicitor.

In an effort to be as comprehensive as possible, and in the hopes that doing so can still serve to avert needless litigation, we have responded separately to each allegation included in your letter dated November 5, 2007, which enclosed a draft Complaint (the "Complaint") prepared by the Office of the Solicitor, and included with our responses both information previously provided (or otherwise made available) in the course of EBSA's investigation and, where appropriate, additional information that we have uncovered since that time. The information and documentation enclosed herewith supports the positions being taken by the Trustees with respect to each allegation that was discussed at our meeting and that had been previously addressed in

the May 3, 2005 letter from EBSA (the "VC Letter").

We call to your attention that while many of these documents were submitted and otherwise made available to EBSA during its investigation, the Trustees believe that this submission will put the Office of the Solicitor in a better position to understand and evaluate the relevant facts and circumstances, and the relative merits of working with the Trustees to find basis upon which to settle the issues addressed herein. It is the Trustees considered belief that following a circumspect examination of this submission, the Office of the Solicitor will arrive at conclusions that differ from those that previously have been reached.

As a threshold matter, we note that most of the claims made purport to be for services that allegedly were not rendered and/or for which there has been an alleged overpayment. In essence, the underlying claim is that there exists insufficient documentation to support that the services rendered warranted the fees paid. As demonstrated below, there is, in fact, considerable documentation to support the positions taken by the Trustees. Importantly, even in those instances where it has been concluded by EBSA that the documentation is insufficient, there is abundant evidence, whether testimonial or otherwise, that will establish and confirm that the work was, in fact, performed and/or that the work was reasonable and necessary to the administration and maintenance of the Funds and the plans of benefits provided thereunder. In these circumstances, the Trustees firmly hold that the Office of the Solicitor would be acting to the detriment of the Funds, and their participants and beneficiaries, by turning down a generous monetary offer in favor of pursuing (at considerable expense and subject to the uncertainties of litigation) greater relief based on claims that are not founded on provable grounds of sustained losses or inadequate consideration, but rather on questionable assertions that will rest on proving inadequate documentation. Moreover, we hope that before proceeding to litigation, you will consider how unlikely it is that a court, confronted with such overwhelming and unrefuted evidence, would impose liability merely because there is not precise written documentation for every charge or allocation challenged.

As we have discussed, the Trustees are interested in continuing to engage in a dialogue with the Office of the Solicitor in the hope that the parties can find a mutually acceptable framework upon which to resolve the claims being made. Accordingly, included in Section II of this submission is a settlement proposal from the Trustees. With the foregoing considerations in mind, we ask that you consider an offer of settlement, which in light of the serious risks posed to the Office of the Solicitor if it should choose to litigate, should be viewed as a reasonable, if not generous means to resolve the pending dispute. If the parties are unable to achieve a mutually agreeable resolution of the claims being made, the Trustees are prepared to vigorously defend this matter.

I. Information in Support of the Trustees' Positions

A. Alleged Improper Payment to the Union for Collection Services Performed by the Union Business Manager

In your letter dated November 5, 2007, you stated that "during the period May 2000 to April 2002, the Asbestos Workers Local 12 Funds improperly reimbursed Asbestos Workers Local 12 approximately $50,000 for alleged collection services performed by union business manager and fund Trustee Dennis Ippolito and his predecessor." Section 1 of the VC letter alleges that "the Funds' payment to the Union for the Business Manager's alleged collection services . . . violate[d] ERISA Sections 404(a)(1)(A)(ii), (B) and (D); and 406(a)(1)(D) and 406(b)(1) and (2)." As explained in our meeting, the Trustees emphatically dispute the allegation that the Funds' payments to the Asbestos Workers Local Union 12 (the "Union") for the Business Manager's collection services violated ERISA's fiduciary requirements and have evidence to support that: (1) the Trustees exercised prudence in approving the delinquent contractor collection expense; (2) the Business Manager did, in fact, perform collection services; and (3) the Business Manager did not deal with assets in his own interest or act in any transaction involving the Funds on behalf of any party whose interests were adverse to the Funds.

1. The Trustees Exercised Prudence in Approving the Delinquent Contractor Collection Expense

Beginning in the early to mid 1990's, the Trustees of the Funds, in recognition of the services performed by the Union Business Manager in regards to delinquent contractors/collections, approved a monthly payment to the Union to compensate it for these services, which were necessary to the operation of the Funds and that were performed by Union employee(s). They concluded that at least one (1) day per week (in accumulated time) was expended by the Business Manager in assisting the Funds in ensuring that signatory contractors made appropriate and timely contributions to the Funds. It is beyond question that services rendered to ensure that signatory employers are current on their contribution obligations to the Funds are necessary and inure to the benefit of the Funds. The compensation to the Union was at the same wage and benefits rate as a Local 12 Journeyman's hourly rate.

The methodology utilized by the Funds and the Union for paying this plan expense was derived as follows: each month the Union would invoice one (1) day's wages and benefits per week to the Funds. The Funds remitted payment for the invoice to the Union. It is critical to note that the Business Manager received no additional compensation as the result of this arrangement and he personally received no monies from the Funds and no plan assets. The Business Manager's salary and benefits would have been exactly the same had the arrangement not been in place, or had the Fund failed to pay the invoices. Equally important is the fact that at the time the Trustees established this practice, Mr. Ippolito was not the Business Manager. It should also be

considered that the Trustees continue to believe that they were acting prudently when they approved the Delinquent Contractor/Collection expense. The alternative to reimbursing the Union for utilizing the services of the Business Manager would have been either increased legal/accounting expenses or hiring a Fund employee to perform these services. Failure to arrange for the performance of these services would have been imprudent, and would have resulted in an increase in delinquent and uncollectible contributions. At the time the Trustees made the decision, it was reasonable and prudent to utilize the services of the Business Manager to assist in ensuring timely contributions to the Funds as a less expensive, more effective alternative.

2. The Business Manager, Did in Fact, Perform Collection Services

The VC Letter characterizes the Business Manager's services as "allegedly performed" and inaccurately describes the Business Manager's activities as being limited to the making of phone calls. In documents previously submitted to EBSA, the Trustees have provided, inter alia, numerous Audit Subcommittee Meeting Minutes and Joint Trade Board Minutes that establish that (i) collection services were in fact performed, and (ii) that the Trustees were cognizant of the Business Manager's collection activities. Also worthy of note are the various efforts of the Business Manager that occurred during the times between the meetings, *see e.g.*, Exhibit 1A, Minutes of Audit Subcommittee Meeting at 3 (June 8, 2000) (scheduling meeting with employer Monosis, Inc); Exhibit 1B, Minutes of Audit Subcommittee at 2 (March 21, 2001), (documenting fieldwork and employees being paid off the books for Cro-Am Insulation); Exhibit 1C, Minutes of Audit Subcommittee at 2-3 (October 12, 2001) (scheduling meetings with Liberty and Park).

As can be seen from these Minutes, the Union Business Manager was an active participant at each meeting. In addition, prior to each meeting and following each meeting, the Business Manager engaged in various activities that assisted the Funds in collecting delinquent employee benefit contributions. As Mr. Ippolito previously has informed EBSA, these activities included:

1. contacting delinquent employers by telephone;
2. visiting employers, offices/worksites; and
3. meeting with employers, Fund Counsel and the Funds' Payroll Auditors (or combinations of those people).

In addition, in order to provide security for unpaid contributions, the Local 12 collective bargaining agreement entered into with contributing employers to the Funds (the "CBA") requires employers to post a fringe benefit bond (or post a Certificate of Deposit ("CD") for the benefit of the Funds).[1] These bonds/CD's are adjustable based on the number of employees the employer has employed over a given period. This complex arrangement requires, occasionally,

[1] A copy of an example of the CBA is attached hereto as Exhibit 2.

arranging for contributing employers to raise their bonds to conform to the CBA as a way of providing security for contribution payments to the Funds. In those instances in which voluntary compliance cannot be achieved, the Business Manager intervenes and, with the assistance of Fund Counsel, the employer is brought into compliance. There are also instances in which recoupment from the bonds/CD's are required. The Business Manager provided, at relevant times, input and assistance with respect to these services, which were necessary for the proper completion of this process.

The Business Manager also engages in various efforts, including placing multiple telephone calls and personally visiting employer jobsites and workplaces, in an effort to induce these contractors to make their payments as required and to avoid appearing on a Delinquency List. It is important to note that the published Delinquency List represents only those employers who did not respond to the Business Manager's repeated efforts to collect required Fund contributions. These efforts, which took place at times relevant to the claims made herein, were known to each of the then Trustees and witnessed by the Trustees as well.[2]

It has been EBSA's position that there exists a lack of documentation to support the Trustees' decision to reimburse the one day a week to the Union for the Business Manager's activities. While the ability to provide such documentation is preferable, the absence of such documentation is not a violation or *per se* imprudent. In the instant circumstances, it is of critical importance that the Trustees can establish through personal experience and knowledge, which will be based upon, among other things, "eye-witness accounts" that the Business Manager engaged in collection efforts sufficient to warrant the consideration paid and that were of clear benefit to the Funds.

3. The Business Manager Did Not Deal with Assets in his Own Interest or Act in Any Transaction involving the Plan on Behalf of any Party Whose Interests Were Adverse to the Plan

Section 406(b) is not violated by the Trustees' approval of the expense to the Union for Delinquent Contractor/Collections. The Business Manager (who was also a Trustee) was not dealing with the assets of the Plan for his own interest or for his own account. The Union paid the Business Manager his salary and benefits, not the Funds. The Funds made a reasonable arrangement with the Union for the provision of the services that the Business Manager rendered on behalf of the Funds. The Business Manager did not act in any transaction involving the Funds on behalf of any party whose interests are adverse to the interests of the Funds or the Funds' participants and beneficiaries. Just the opposite is the case here. The Business Manager's role

[2] The Trustees and the members of the Joint Trade Board are, typically, the same people. Each Trustee periodically receives a copy of the Delinquency List and each Trustee sits on the Joint Trade Board. Additionally, two Employer Trustees and two Union Trustees are appointed to the Audit Subcommittee where delinquent accounts are discussed and remedied.

was to aid the Funds in collecting employee benefit contributions from delinquent employers. The interests of the Union and the Funds were not adverse, rather they were united. Nor did the Business Manager receive any consideration for his own personal account from Local 12 that is not specifically excepted from the purview of prohibited transactions, as provided for in Section 408(b)(2) and 408(c).[3]

It should be noted that there is a substantial statute of limitations and/or laches defense to the claim that the Trustees breached their fiduciary duty with regard to the above claim. On or about December 13, 2001, the Department received the Funds' 5500's with all of the attachments thereto, pursuant to its request of November 27, 2001. These documents specifically set forth the expenses that are the subject of the instant claim. Nearly two and a half years went by before EBSA inquired as to this expense, and no suit was commenced (or tolling agreement executed) until 2006. It is clear that EBSA had in its possession and was aware of all of the facts necessary to determine that a violation of ERISA may have occurred well before the running of the statute of limitations. Given EBSA's expertise, actual knowledge of the facts necessary to understanding that a claim exists will be easier to demonstrate in these circumstances, than as against a lay-person. Moreover, no explanation has been given for the long delay between the commencement of the investigation and the interposition of this claim.

Even giving EBSA the benefit of the doubt, however, it is clear that most of the amounts claimed in the VC Letter related to this claim fall outside the statute of limitations period. At best, all of the amounts claimed from 1996 to the first part of 2000 would be time-barred. EBSA has acknowledged this defense and appears to have adjusted its claims accordingly. Finally, the Union unilaterally ceased the practice of sending invoices to the Funds and the Funds ceased paying for these services in 2002, well before EBSA alerted the Trustees that it considered the payments inappropriate.

As demonstrated above, the Trustees have extensive evidence to support the fact that they exercised prudence in approving the collection services expense. In addition, the Trustees have substantial evidence that the services in question were, in fact, performed by the Business Manager. Moreover, the Trustees have evidence that the Business Manager did not deal with assets in his own interest or act in any transaction involving the Funds on behalf of any party

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[3] Section 408(b)(2) of ERISA permits reasonable arrangements with parties in interest for the performance of services necessary for the operation of a plan. Ensuring the timely payment of contractually required employee benefit contributions is clearly a service necessary for the operation of the plan. Moreover, Section 408(c) states that fiduciaries may not receive compensation "from such plan" if s/he is a full time employee of any employee organization whose members are participants in such plan. Exactly the opposite facts are present here. The Business Manager received full-time compensation from the Union, and nothing from the Funds. As such, the Business Manager's compensation is anticipated under Section 408(c) of ERISA and the transaction involving the Union and the Funds is not a violation of Section 406(b), but rather, falls under Section 408(b)(2) as a reasonable arrangement for services necessary to the operation of the Funds.

whose interests were adverse to the Funds. With respect to the allegations made in the Complaint relating to the payment to the Union for collection services performed by the Business Manager, the Trustees can prove that the services were performed and the consideration was reasonable. Accordingly, the Trustees have acted consistently with their fiduciary responsibilities, and the Office of the Solicitor can not prevail with respect to these claims.

B. Alleged Improper Allocation of Payroll Audit and Legal Fees

The November 5, 2007 letter stated that "the Funds improperly paid for legal and accounting services shared with the Asbestos Workers Local 12 General Fund and Insulation Industry Promotion Fund ("IIPF"), which did not contribute monies to cover their share of the services consumed." This allegation corresponds to the portion of the VC letter wherein Section 2 alleges that there was an improper allocation of $19,981.37 for payroll audit fees and of $17,602.37 for legal fees. It is the Trustees understanding that this conclusion was based on EBSA's theory that "seven entities benefited from the payroll audits (and the legal fees for collection services), [but] only the five Funds shared in the payment for these services." The Trustees contest the conclusion that the arrangement constitutes a violation.

Other than setting forth the statutory language, EBSA has not demonstrated that the above arrangement is a violation. Our research has revealed no case or regulation that requires a Union or an Industry Promotion Fund to share in these traditional Fund expenses. Moreover, EBSA's position fails to take into account that there is no additional expense associated with including the General Fund and the IIPF on these schedules and that the Funds were not damaged in any way by including these two extra columns on the spreadsheet.[4]

Moreover, significant portions of the amounts claimed are beyond the limitations period. Presuming for present purposes that the six year period applies, the amounts claimed by the Department for 1998, 1999 and the first three months of 2000 are time-barred. Again, it is the Trustees' desire to resolve the within matter, rather than litigate the parties' various contentions. Presuming the Department's gross figures are accurate, from 1998 to 2004, the Funds paid $349,674.00 for Payroll Audits and $308,048.66 for legal services on collection matters.[5] The total of the two expenses is $657,722.66. The period surveyed consists of seven (7) years. A yearly amount (dividing the total by seven (7) years) yields a yearly expense of $93,960.35. As the first 2 ¼ years is time-barred, $211,410.79 is outside the limitations period, yielding a result of $446,311.87 as the total paid.

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[4] It might be helpful to explain that the calculations/processes performed by the auditors focuses on hours unreported/uncontributed by employers. Once that process is completed, it is merely arithmetic (multiplying the hours by the various rates) that yields the damages calculations. In today's computer age, the Excel spreadsheet consists of an additional column for the General Fund and one more for the IIPF.

[5] The Department did not itemize these amounts on a yearly basis.

By taking the percentage of overall contributions paid by contributing employers that are payable to the General Fund during 2002, which was equal to 8.7%, and multiplying that percentage by the total expense ($446,311.87) yields a result of $38,829.13. Employing the same process for the IIPF at the rate of .4% during 2002, the result is $1,785.25.[6]

It is important to note that the above figures do not factor in amounts collected by the Funds for interest, attorneys fees, Trade Board fees and expenses, *etc.*, that were not shared with the General Fund or the IIPF, but were kept by the Funds. Suffice it to say, the above figures are the outside figures that EBSA reasonably could pursue based on a more equitable formula, not the $110,000 figure presented in the November 5, 2007 cover letter sent by the Office of the Solicitor together with the draft Complaint.

It is Trustees' position that the above arrangement was not a violation and there were, in any event, no demonstrable damages to the Funds. However, assuming the validity of the Office of the Solicitor's contention, the Trustees have demonstrated that the proper allocation formula should not be broken down equally among seven entities. Instead, as demonstrated above, the more equitable approach would be to allocate the expenses in question *pro rata* by contributions. This approach is equitable and reasonable under the circumstances and consistent with the approach generally taken by multiemployer employee benefit funds when allocating common expenses in funds such as these.

C. Alleged Improper Payments to Schultheis & Panettieri for Financial Audit and Secretarial Services Performed in May 2001

In your letter dated November 5, 2007, you stated that "in June of 2001, the Local 12 Funds improperly paid an invoice in the amount of $31,310 for accounting services that were not demonstrably reasonable or necessary for the operation of the Funds." It is the Trustees' understanding that this conclusion was based on an invoice that the Funds paid to Schultheis & Panettieri ("S&P") in June 2001 for financial audit and secretarial services. The VC Letter

[6] The forgoing numbers were based on the following:

	1/02-6/02	7/02-12/02	1/02-6/02	7/02-12/02
WELFARE	$ 6.44	$ 6.44	28.0%	27.9%
ANNUITY	$ 6.80	$ 6.80	29.6%	29.5%
PENSION	$ 4.20	$ 4.20	18.3%	18.2%
AJEF	$ 0.45	$ 0.45	2.0%	2.0%
VACATION	$ 3.00	$ 3.00	13.0%	13.0%
GENERAL	$ 2.00	$ 2.03	8.7%	8.7%
IIPF	$ 0.10	$ .15	0.4%	0.4%
TOTAL	$ 22.99	$ 23.07	100.0%	99.7%

states, in pertinent part, that the Funds paid S&P for services "purportedly performed in May 2001 . . . without any supporting documentation as the S&P invoices only showed the dates and amounts billed." As explained in our meeting, the Trustees strenuously dispute this allegation and can support the conclusion that there is evidence demonstrating that: (1) S&P's services were reasonable and necessary; (2) the work was, in fact, performed in May 2001; and (3) the Funds were provided with adequate documentation in support of the June 2001 invoice (the "Invoice") before it was paid. Under these circumstances, we do not believe that a court would find that the payments were made in violation of ERISA.

1. **The Services Performed by S&P in May 2001 Were Reasonable and Necessary**

The undisputed evidence establishes that the fees paid to S&P were for reasonable and necessary services. S&P was initially retained by the Funds to audit the financial statements for the year that ended December 31, 2000, to perform a detailed analysis of the Funds accounting operations and procedures and to assist the new Fund Manager, Al Wassell, in setting up appropriate internal controls and filing systems. In performing the foregoing duties in May 2001, S&P was in the fieldwork stage of their audit procedures, which means that S&P employees were working on location in the Funds' office on a daily basis. At this time, S&P was reviewing Funds' records, including, without limitation: (i) information associated with Annuity Fund account balances; (ii) information necessary and related to financial statement disclosures and the execution of final audit workpapers, such as bank statements, custodial statements, investment manager statements, contribution registers and benefit payment registers. S&P also conducted an analysis of the Funds' payroll, taxes and employee benefits. Finally, S&P analyzed the fees paid to the Funds' professionals to ensure that they were consistent with contractual obligations and searched for accrued expenses or unrecorded obligations.

The accounting system in place at the time of S&P's retention consisted of manual records maintained by the prior accountant. The computer system that was operational at this point in time (and that was used to maintain participant eligibility, contributions, and certain benefit payments) had been designed and maintained by a sole practitioner who did not have extensive experience with multiemployer employee benefit funds. Due to the state of the Funds and the fraud that previously had occurred in the Funds' office, it was crucial for S&P, as part of its accounting function, to ensure that they were ascertaining and documenting all of the relevant information relating to the Annuity Fund account balances and the financial statement disclosures of each of the Funds.

It would appear to be beyond question that under the applicable facts and circumstances, the foregoing accounting services were reasonable and necessary to the prudent operation and administration of the Funds.

2. S&P's Services Were, In Fact, Performed in May 2001

The fact that S&P actually performed the financial audit and secretarial services for the Funds in May 2001 can be established beyond challenge in numerous ways, including: (1) weekly timesheets prepared by staff accountants in May 2001 (Exhibit 3); (2) staff call in logs detailing where employees could be reached every day (Exhibit 4); and (3) work product, such as cash confirmations prepared by S&P that were signed by the Fund administrator and a Citibank or Fleet Bank representative (Exhibit 5). Furthermore, all but one of the S&P employees that performed services for the Funds continues to work for S&P and we are advised that each individual would testify that the financial audit and secretarial services set forth on the Invoice were performed in May 2001. Finally, we have been advised that a number of the Trustees, the Funds' office employees, Funds' manager, and other professionals would all testify to the best of their recollection that S&P employees were present and working in the Funds' office on a daily basis during May 2001.

Contrary to the allegation described in Section 8 of the VC Letter, there are contemporaneous workpapers documenting the services performed by S&P in May of 2001. For example, several timesheets prepared by S&P staff accountants were faxed to S&P from the Funds' office in May 2001 (Exhibit 6) demonstrating that the accountants were present and performing various services in the Funds' office at this time. Because it is common practice among accounting firms to "sign off" on work papers only when the work is completed, we have also included workpapers that are copies of bank statements reconciled to general ledgers that James Heinzman initialed in May 2001 (Exhibit 7) as evidence of contemporaneous documentation for services performed at this time.

3. The Trustees Were Provided With and Reviewed Reasonable and Sufficient Documentation in June 2001 Before the Invoice was Paid

There is evidence that would be adduced that the Funds only paid the Invoice after obtaining adequate documentation verifying the financial audit and secretarial work performed in May 2001. Ordinarily, S&P employees complete time sheets each week indicating the work they performed for each client. At the end of every month, the time charges are run and invoices are sent to each client based on the work performed. Thus, the June invoices for work performed in May were based on the actual time charges for the month of May 2001.

We have been informed that James Heinzman would testify that he recalls that Trustee Leo brought to his attention the fact that S&P sent the Invoice without including the specific time charges attached (*see* Exhibit 8). We have been informed that Mr. Heinzman recalls Mr. Leo stating at that time that the Funds would not pay any invoice without such documentation. Accordingly, S&P faxed the specific time charges in support of the Invoice (Exhibit 9). We are

advised that Mr. Heinzman would testify that it was only after he provided this information that Trustee Leo approved and the Funds paid the Invoice. While we have been unable to locate a copy of the specific facsimile transmission described in this paragraph, Mr. Heinzman's recollection of the dialogue between Trustee Leo and S&P regarding the need for adequate documentation is corroborated by the fact that the Invoice and all subsequent invoices set forth S&P's specific time charges. These subsequent invoices can and will be provided to the Office of the Solicitor upon request. By requiring additional documentation prior to approving and paying the Invoice, the Trustees acted in accordance with their fiduciary duties because they exercised the level of prudence that was necessary for the existing circumstances. *See Henry v. Champlain Enterprises,* 445 F.3d 610, 620 (2d Cir. 2006) (finding that a fiduciary's failure to produce notes documenting the steps it took during its investigation leading up to an employee stock ownership plan (ESOP) transaction did not provide the basis for a breach of fiduciary duty because "the focal point of the inquiry under ERISA is not whether a fiduciary took adequate notes of its investigation but whether it acted with the prudence required of a fiduciary under the prevailing circumstances at the time of the transaction").

We have also included S&P's annual work in process registers for 2001, which contain the same information that was provided to Trustee Leo upon his request (Exhibit 10). The work in process registers correlate to the individual employee timesheets that were referenced in Exhibit 3. The work in process registers for May 2001 primarily consist of code number 001, described as "Y/E Audit, Stamp Cnt, Tests." We have been advised by S&P that employees utilize this code to describe all tasks associated with the execution of year end financial statement audits including, but not limited to, the collection of audit evidence, stamp counts and testing. In the construction industry stamps are used to track employer contributions. For your information, the term "stamp count" refers to S&P's reconciliation of employer contributions and the term "testing" when used in this context refers to S&P's reconciliation of benefits paid to participants.

As demonstrated above, the Trustees have extensive evidence to support the fact that the charges set forth on the Invoice were reasonable and necessary. In addition, the Trustees have extensive evidence that the services in question were, in fact, performed. Moreover, the Trustees have extensive evidence that they received adequate, detailed documentation in support of the Invoice prior to authorizing payment. With respect to the allegations made in the Complaint relating to the Invoice, the Trustees have acted in all respects consistent with their fiduciary responsibilities.

D. Investment Analysis Performed by S&P during 2001-2004

The November 5, 2007 letter stated that "during the period 2001 to 2004, the Fund paid $39,180 to accountants for alleged investment analysis and tracking and other services that were not demonstrably reasonable and necessary for the operation of the Funds." It is the Trustees' understanding that this allegation is based on the VC Letter's summary of "accounting assistance charges." The VC Letter alleged that "there is no documentation to establish that investment

analysis was provided" as part of the accounting assistance that S&P provided to the Funds. There is abundant documentation providing otherwise, as well as evidence that would remove any question as to whether the analysis was performed.

1. Investment Analysis is Included in Accounting Assistance

Accounting assistance represents two separate items: (1) providing assistance to the Funds' office with administration/internal controls; and (2) investment analysis. The administrative assistance piece of accounting assistance predominantly consists of organizing file systems and record retention, re-allocation of office space, and analysis of employer contributions and real estate tax appeal. We are advised that the investment analysis portion of accounting assistance is conducted for use during the audit procedures and is a standard accounting practice that S&P employs for all of its clients. This practice involves reviewing the custodial reports to ensure that all investments were properly accounted for, dividends were paid and no errant transactions exist.

2. S&P did, In Fact, Provide Both Administrative Assistance and Investment Analysis

It can be demonstrated that S&P performed the tasks described as accounting assistance. Included as Exhibit 11 is a summary of the accounting assistance charges that were highlighted in the VC Letter. The services described include both bookkeeping/administrative assistance and investment analysis. To support the summary of accounting assistance charges, we have included herewith all of the individual S&P employee timesheets that correlate to the dates and hours listed on the summary (*see* Exhibit 12).

For the bookkeeping/administrative assistance charges noted in the VC Letter, we have also provided certain contemporaneous evidence demonstrating that the administrative assistance in question was performed. The first document in Exhibit 13 represents a letter from James Heinzman to the Funds' Board of Trustees, dated April 8, 2004, detailing the recalculated rental rates of the Funds' office based on the space reallocation. This letter is consistent with employee Murray's time charges for the week ended April 10, 2004, which are also set forth in Exhibit 13 where the description of services listed on the time charge states "expense study and modify rental rates to reflect union move upstairs and to reflect remodel of upstairs storage area."

In addition to weekly timesheets, we have included actual work product to further support the fact that S&P did conduct an investment analysis as part of its accounting assistance. Exhibit 14 is a detailed investment subsidiary ledger prepared by S&P. S&P employees created the investment subsidiary ledger by collecting the transaction history of each security for each portfolio. After the information is accumulated in this report, S&P auditors utilize the details listed for each security to produce the audit workpaper (Exhibit 15). The audit workpaper reconciles the asset holdings and related investment income from the Bank of New York

("BONY") portfolio by comparing the accrued interest with the interest payments that were actually received for each security. The right hand column of the audit workpaper provides the reason for the discrepancy based on S&P's follow up investigation, such as for example, the difference between the interest accrued and the interest received for its holdings of Citizen Communication, purchased on December 31, 2001 (second security listed), was $5,433. S&P reconciled this discrepancy when it learned that $75,000 of their holdings had been sold in December of 2002, which is noted in the far right column of the report.

We are advised that Mr. Heinzman and the S&P employees that performed the accounting assistance and investment analysis will testify that they performed these tasks, as set forth in the invoices and timesheets, for the benefit of the Funds.

3. Both the Administrative Assistance and Investment Analysis Included in the Accounting Assistance Charges Were Reasonable and Necessary

The bookkeeping/administrative assistance that S&P provided and that is in question assisted the Funds' office to both establish and maintain an internal control structure. This assistance was reasonable and necessary because the Funds must take steps to ensure that assets are safeguarded against losses due to error or unauthorized use or disposition. It is also essential that transactions are executed in accordance with management's authorization and recorded properly to permit the preparation of financial statements in accordance with generally accepted accounting principles.

The practice of ensuring that all investments are properly accounted for, dividends have been paid, and no errant transactions exist is particularly important for employee benefit plans, where investments are usually the plan's largest asset. Fiduciary issues would arise in the event that these internal control services were not performed and the Funds sustained a loss resulting from an error or unauthorized use or disposition of assets.

S&P's investment analysis was reasonable and necessary because it was the only way to accumulate the earnings and holdings by security and roll the activity forward to ensure that no transactions were dropped from the reports. S&P's management letter, dated April 26, 2002 (Exhibit 16), details the discrepancies that were noted while reconciling the Annuity Fund's investments to Circle Trust's custodial statements during the December 2001 audits, including: (1) a government security with a fair market value of $507,969 that was excluded from the December 31, 2001 valuation; (2) the cost on a corporate bond was misstated by $6,373; and (3) the accrued interest on a corporate bond was misstated by $10,852. The Circle Trust errors that were noted in the management letter were discovered as a direct result of S&P's investment analysis.[7] This information ultimately led the Trustees to discharge Circle Trust in favor of

[7] EBSA has asserted that S&P's billing for Circle Trust issues was not included in the accounting assistance/investment analysis charges. However, S&P's billing for Circle Trust issues was dependent on the type of work that was performed. Services that were performed to identify problems were billed to

another custodial bank.[8] Had S&P not performed the investment analysis as part of its accounting assistance and uncovered these errors, EBSA could potentially be asserting that the Trustees failed to adequately monitor the services provided by Circle Trust. S&P's accounting assistance, including the investment analysis, was reasonable and necessary because it was part of a reasonable and necessary system of internal accounting controls. The value of the services is readily established in that it enabled the Trustees to take affirmative action to terminate Circle Trust, which had the attendant result of avoiding the losses and claims that were sustained by many other employee benefit plans as a result of Circle Trust's imprudent actions and eventual bankruptcy.[9]

As established above, the Trustees have extensive evidence to support the fact that S&P's accounting assistance included bookkeeping/administrative assistance and investment analysis. In addition, there is extensive evidence that both of these services were, in fact, performed. Furthermore, the Trustees have a myriad of evidence demonstrating that both items included as part of S&P's accounting assistance were reasonable and necessary. With respect to the allegations made in the Complaint relating to the S&P's accounting assistance and investment analysis, the Trustees have acted in all respects consistent with their fiduciary responsibilities. In the absence of any facts indicating that S&P's services were problematic and where it is demonstrated that the services in question were reasonable, consistent with industry practice and conferred value, there is no basis upon which EBSA should conclude that a prudent person under

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accounting assistance/investment analysis, while services associated with the implementation of corrective action were billed to other areas. For example, S&P employee A. Nofi's time was billed to accounting assistance/investment analysis (*see* Exhibit 17) because she analyzed the Circle Trust statements collecting the transaction history by security and creating the investment subsidiary ledger that was to be used by the S&P auditors. When the auditors utilized this information to reconcile significant discrepancies with Circle Trust and describe these issues in a management letter to the Fund, these services were billed to areas other than accounting assistance/investment analysis (Exhibit 17).

[8] While not a direct result of the investment analysis, S&P also discovered another Circle Trust error when reconciling the Core Fund, a Trustee managed portfolio where the net asset value ("NAV") of the portfolio is allocated to participants on a daily basis. Due to a discrepancy between the actual value of the Core Fund and the total values that had been allocated to participants, S&P conducted an investigation and discovered that a security had been excluded from the NAV at the end of the year. As a result, $232,367 of the total Circle Trust investments had not been allocated to participant accounts as of December 31, 2001 (*see* Exhibit 16 for Management Letter with a description of this issue).

[9] We are aware that the U.S. Department of Labor sued Circle Trust to restore millions of dollars in losses on imprudent and risky investments with the Trust Advisors Stable Value Plus Fund (*see* Exhibit 18 for Complaint) and Circle Trust was forced to restore more than $8.8 million to 1,500 pension plans nationwide pursuant to a settlement agreement (*see* Exhibit 19). As a direct result of the very actions being questioned herein, the Trustees instituted measures to avoid losses that would have otherwise made the Funds part of the aforesaid settlement.

similar circumstances would have acted differently than the Trustees. *See Henry v. Champlain Enterprises, Inc.*, 445 F.3d at 621-22 (holding that the court is unable to assess damages in the absence of any findings that the defendant failed to ascertain errors or identify flaws that a prudent fiduciary would have detected).

E. Numerous Services Provided by S&P Following Completion of the Annual Audit Reports

The final allegation included in the November 5, 2007 letter states that "during the period 2000-2004, the Funds paid accountants as much as $190,000 for numerous services, many provided after completion of the annual reports and governmental filings, that were not demonstrably reasonable and necessary for the operation of the Funds." Section 10 of the VC Letter states, in pertinent part, that "[a]fter the issuance of the audit reports, S&P continued billing the Funds for financial audit and secretarial services, although there is no documentation establishing that any additional audit or secretarial work was performed . . . Our investigation also disclosed that in a number of situations S&P continued billing the Funds for financial audit and secretarial services after the release dates of the reports." As demonstrated below, there is abundant evidence that the work in question was: (i) in certain instances, performed before the reports were issued; (ii) in other instances, performed in anticipation and in preparation for the subsequent years audits; and (iii) in all respects reasonable and necessary.

1. Work Performed for the Subsequent Years' Audits

Generally, there are three stages involved in a financial statement audit: (1) planning; (2) fieldwork; and (3) post fieldwork. Mr. Heinzman's letter to Mr. Goldberg, dated March 8, 2006 (Exhibit 20) provides detailed information relating to this issue. In that letter, Mr. Heinzman explained that $47,000 of the total charges in question that were incurred in November and December of each year related primarily to planning and testing for the following years' audits. Planning includes, but is not limited to, preparation of audit confirmation letters, preparing checklists, and review of a client's general ledgers to identify unusual transactions to be investigated during the audit. Testing refers to items such as "test of benefits paid" for the Welfare, Pension, and Annuity Funds, and "tests of employer contributions" for all of the Funds. Thus, with respect to these amounts, there simply can be no argument that the charges were incurred as a result of a continuation of billing after the release date of the financial reports. If the Office of the Solicitor would like to see additional documentation in support of the foregoing, such information will be provided upon request.

2. Work Performed Following Completion of Fieldwork

The assertion by the Office of the Solicitor that the balance of the work included in the $190,000 charge was performed following the issuance of the audit is incorrect. Secretarial work and work relating to audit completion should be characterized as the work that occurs following the

conclusion of the fieldwork. The audit, in accordance with standard accounting practice, is dated as of the date that the fieldwork is completed. Thus, any subsequent work necessary to complete the audit is not post-issuance, but simply post-fieldwork. PPC's "Guide to Auditing Employee Benefit Plans—Chapter 6—Concluding the Audit" (Exhibit 21) details the many procedures required to be performed after fieldwork which require a significant amount of effort including, but not limited to, review of all work papers, summarization and evaluation, preparation of relative tax forms (5500 and 990), supervisory review of all audit work performed, drafting financial statements, preparing supplemental schedules, and auditor's report.

For the schedule of charges totaling $190,000 that the DOL has categorized as unrecognized auditors, post fieldwork and post release charges, we have provided a detailed report identifying every auditor and describing the type of service that was performed in connection with the $190,000 (Exhibit 22). In addition, Exhibit 23 provides a sampling of timesheets completed by employees and work product or other documentation supporting the time charges. This will both demonstrate the type of work described on the timesheets and the fact that it was actually performed. For example, in the first set of documents contained in Exhibit 23 is a timesheet completed by S&P employee Trikal Singh stating that during the week ending December 13, 2003, he spent 14.50 hours performing testing for the 2003 Local 12 Annuity Fund audit. Following Mr. Singh's timesheet, we have included his audit sampling worksheet and "Test of Annuity Benefits Paid," which sets forth his handwritten conclusions and is initialed and dated December 03, 2003. We have also provided herein (following employee Mr. Singh's timesheet and supporting documentation) in Exhibit 23, a timesheet completed by S&P employee Ranjitkumar Benjamin stating that during the week ending December 20, 2003, he spent 17.50 hours performing testing for the 2003 Local 12 Pension Fund audit. After Mr. Benjamin's timesheet, we have included his Test of Pension Benefits that reflects his notes and comments. You will note that the Test of Pension Benefits also includes his handwritten signature, dated December 17, 2003. Included in Exhibit 23 are several more examples of employees timesheets followed by supplementary evidence demonstrating that the work was, in fact, performed. Additional examples containing similar supporting documentation will be provided to you upon request.

Finally, we have included copies of the covers of S&P's financial statement folders as contemporaneous evidence of the work that was performed after fieldwork was completed (*see* Exhibit 24). S&P tracks several benchmarks for work that is done after the completion of fieldwork including: (1) the date the audit was submitted for review; (2) the date the detailed review was completed; (3) the date the reports were processed; and (4) the release dates. The covers of the financial folders indicate when each benchmark was completed and are dated and initialed by the appropriate S&P employee. The dates and sign offs demonstrate that all of this work was completed after the fieldwork date.

The Trustees have compelling evidence to support that the $190,000 paid to S&P was for numerous services that were reasonable and necessary for the operation of the Funds and that S&P did not continue billing the Funds for financial audit and secretarial services following completion of the annual reports and governmental filings. As demonstrated above, the Trustees have irrefutable evidence that $47,000 of the total charges in question were incurred in the final two months of each year for work that related primarily to the subsequent years' audit. In addition, there is extensive evidence that the balance of the $190,000 was for secretarial work and work necessary for audit completion. The Trustees have wide-ranging evidence that these services were not performed following the issuance of the audit, but instead, in accordance with standard accounting practice, were executed following the conclusion of the fieldwork. With respect to the allegations made in the Complaint relating to the $190,000 that was paid to S&P for numerous services, the Trustees have acted in all respects consistent with their fiduciary responsibilities.

II. Settlement Proposal

The Trustees believe that they can present compelling defenses to the allegations set forth in the Complaint. The thrust of those defenses has been set forth above. Nevertheless, the Trustees are mindful of the burdens and expenses associated with litigation. Accordingly, the Trustees are willing to attempt to find a reasonable, mutual basis upon which they and the Office of the Solicitor can achieve a complete and final resolution of the matters addressed in the Complaint and the VC Letter.

As a proposal to settle this matter, the Trustees are willing to pay a total of $100,000. We are prepared to discuss with you upon your request the derivation of this offer in terms of the various allegations set forth in the draft Complaint. This offer is inclusive of any penalties that would be payable under Section 502(l) of ERISA. The Trustees would propose that the monies set forth above (other than any amounts that the parties agree are denominated as attributable to Section 502(l)) would be paid into the appropriate Funds. In addition, the foregoing proposal is based on the assumption that any Section 502(l) penalty would be further reduced to take into account Section 502(l)(4) of ERISA. Any settlement would be conditioned on the parties entering into a mutually acceptable settlement agreement. Importantly, any such settlement must be structured such that no Trustee would be required to resign from serving as a trustee on the Funds. In addition, the Trustees will require a release, including all claims in connection with the draft Complaint and those matters addressed in the VC Letter.

III. Conclusion

As discussed at our meeting and described above, the Trustees are willing to negotiate in good faith with the Office of the Solicitor in an effort to find a mutually acceptable basis to resolve all issues set forth in the Complaint and the VC Letter. The Trustees firmly believe that the settlement proposal set forth above is a reasonable, indeed a generous offer, under all the facts

and circumstances, including, without limitation, the available defenses and the expense and uncertainties of litigation and considering the nature of the issues. We reiterate the concern, as presented at our meeting, that it is of critical concern to the Trustees that in order to resolve this matter the Office of the Solicitor agree not to require the resignation of any of the Trustees.

Please feel free to contact Denis Engel and me if you have any questions or would like to have a further dialogue regarding any aspect of this matter. Denis and I, and the Trustees are willing to meet with you at your offices to continue our mutual efforts to find a basis upon which to bring this to closure.

Sincerely,

Ira M. Golub

IMG/rs

cc: Denis Engel, Esq.
Board of Trustees, Asbestos Workers Local 12 Benefit Funds

2-21

Castillo, Jose - EBSA

From: Castillo, Jose - EBSA

Sent: Monday, March 31, 2008 5:15 PM

To: Weekley, Jennifer - SOL

Cc: Kay, Jonathan - EBSA; Castillo, Jose - EBSA; Goldberg, Robert - EBSA; Rodenhausen, Patricia - SOL; Kade, Dennis - SOL

Subject: RE: Local 12 Part II

Attachments: local 12 Part II - stat lim analysis (dkk)(Jw edits).doc

Jenny,

For the record:

I understand this is only for statue of limitation analysis. However, I have grave concern about the summaries on Issue "C" which is issue number 3 of the ROI, Part II.

Issue "C" as far as I am concern, is the byproduct of issues A and B. The non allocated investment earnings monies for 2000 were used to augment employer contributions of the companies controlled by the Trustees.

And by the way, James Heinzman is the preparer of the individual tax returns of Al Wassell and Dennis Ilppolito.

***First:

The time periods examined, without any question, completely corresponded , well established and DOCUMENTED.

* Table U shows that the time period is from January 2001 until February 2002 when the two Fleet Bank accounts were closed.
During this time frame, the two banks accounts combined recieved $3,093,655.47 employer contribution monies. However, as the table shows, $3,746,738.35 were used as employer contribution transmittals. Meaning, $653,082.88 monies that did not come from employer contributions were used to transmitt the three employer contribution transmittals.

Vol. 32, Exh. 169 is Employer Contribution transmittal dated 10/19/2001 for the period from January 2001 TO June 2001.

Vol. 33, Exh. 170 is Employer contributions transmittal dated 1/25/2002 for the period from June 2001 to December 2001.

Vol. 34, Exh. 171 is Employer contributions transmittal dated 5/1/2002 for the period from December 2001 to Feb. 2002.

Exh. 178, Vol. 36, shows the spreadsheets of actual monies received from trustees controlled employers from June 2001 to Feb. 2002. Data from these spreadsheets were taken from all the deposits received by the Fund om Jan. 2001 to Feb. 2002. The exhibits include copies the checks issued by employers controlled by the ustees AND THE TOTAL IS $421,000 SHORT OF THE transmittal credited towards these employers.

* Note: these two Fleet bank accounts were composed of $5,499,997.00 monies taken from the former plan custodian (Bank of New York), the $700,000 matured CD plan assets and off course the employer contributions

eceived from employers.

And by the way, Mr. James Heinzman's audits did not discover this $5,499,997 monies. He admitted it on his interview dated 9/24/2007 (Exh. 111, Vol 24, page 20 of the ROI, part II. He did not discover this money despite all those undocumented audit charges that the Fund paid.

* My DOCUMENTED audit was limited to only three transmittals of companies controlled by the employer trustees which Table S presented and showing the $421,449.84 difference. IF I HAD EXPANDED MY REVIEW TO OTHER employers, wilthout a doubt, I would come up close to the $653,082.88 figure.

The summaries on ROI, part II on Issue "C" as presented on pages 22 thru pages 24 and the tables plus the exhibits of hard copy documents clearly show how plan assets were used to augment employer contributions.

The used of multiple bank accounts and the transfers of monies amongst these bank accounts, which I all documented, to make it a lot harded to trail, clearly show the effort to cover the activities. All of these are clearly summarized in Table R and the exhibits.

***Second: The summary stated that it is possible employers were delinquent and subsequently made up those delinquencies. I completely do not understand this statement. The records of deposits shows what the ROI states. If the above statement is to be considered, How come there is no record of deposits to show that the subseqent make up deposits of these employers which are ALL OWNED OR CONTROLLLED BY THE EMPLOYERS TRUSTEES were made? The record of deposits speak for itself.

The so called subsequent make up deposits does not exist and its imaginary transactions. Tables U and R of the ROI that are supported by hard copy documents (exhibits) are the real deal. These are not the results of any assumptions or imaginations.

One of my first audits steps was to review delinquent employer contributions and review the payroll audits performed by Schulthies & Panettieri. The delinquencies are minimal and No employers that are owned or controlled by the trustees are delinquent. John Brown wanted me to pursue the payroll audits charges of S & P because they are excessive. according to him I spent the whole day (4/21/2004) at S & P reviewing these charges and also obtained statements form him (Exh. 5, Vol. 1, ROI, Part I). I was able to convince JB not to include the payroll audit charges of S & P on the VC letter because it is simply a hard issue to deal with and S & P is so sophisticated in padding the charges.

****Third:
(The difference $421,000).
As an accountant and auditor, this statement blown me away. This implies that the employers controlled by the trustees directly paid the expenses out of the companies accounts. This is the only logical transaction trail. Employer contributions which should have been directly deposited into the plan accounts were instead diverted into payments of plan related expenses.

This imagination or assumption is completely out of this world.

**1) All plan related expenses paid are accurately accounted for according to the financial statements.

With the assistance of Investigator Bob Trujillo, I performed audits of all the plans' expenses by reviewing the cash disbursement journals for all the plans from year 2000 to 2004. We compared amounts entered into the journals to the actual source documents (invoices, bills and cancelled checks and other supported documents).

This is the reason why we discovered the payments to S & P for the May 2001 auditing fees were not supported y documents. Issue no. 5 of the ROI Part I.

**2) If in fact, the employers controlled by the trustees paid these expenses, we need documents, invoices, bills, etc, NOT ANOTHER IMAGINARY BILLS AND INVOICES.

**3) And why they are paying it? There is nothing on the minutes to address this scenario. IF IN FACT THESE OCCURED, THIS is really a sleazy arrangements since these expenses are not reflected in the financial statements and NOT RECORDED IN THE PLANS' accounting records!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!. Also, did these employer trustees deducted these payments from their own gross profits? This is an out of this world accounting scenario.

***Fourth:

Is completely addressed by the second.

The statements above are fully supported by hard copy documents (in the form of exhibits), unlike the spins and alibis of their counsels that are all imaginations and assumptions.

AS I REPEATEDLY STATED MANY TIMES BEFORE, MR. Galub and Mr. Engel needs to provide me with a documents to support the contentions. I do not need another undocumented statements.

I AM CONFIDENTLY SURE 100 percent OF my ALLEGATIONS ON THIS ROI PART II. I presented these issues to a couple of senior investigator coworkers that are also CPAs. The violations here are mainly the works of James Heinzman of S & P and they may seems to be a complicated accounting scenario for non accountants. I REALLY SUGGEST THAT IF MORE VALIDATION IS NEEDED, THE OCA (Office of the Chief Accountant.) AT THE NATIONAL OFFICE IS AVAILABLE for US.

Please call me if you needed more clarification.

Jose

:rom: Weekley, Jennifer - SOL
Sent: Friday, March 28, 2008 1:33 PM
To: Kay, Jonathan - EBSA; Goldberg, Robert - EBSA; Castillo, Jose - EBSA
Cc: Rodenhausen, Patricia - SOL; Kade, Dennis - SOL
Subject: Local 12 Part II

Annexed for your reference, is the statute of limitations analysis for the Local 12 Funds "Part II" matter. Please contact me if you have any questions or if I may be of any assistance.

SOL:JDW
Tel. (212) 337-2094

DATE: March 26, 2008

TO: Patricia M. Rodenhausen
Regional Solicitor

FROM: Dennis Kade
ERISA Counsel

Jennifer D. Weekley
Attorney

Statute of Limitations Analysis for International Association of Heat and Frost Insulators and Asbestos Workers Local 12 of New York City, AFL-CIO, Annuity and Welfare Funds

EBSA Case Nos. 30-99939, 30-99940

RECOMMENDED CONTROL DATE FOR FILING THIS CASE IS JUNE 30, 2008 (THE EXPIRATION DATE OF THE TOLLING AGREEMENT). CLAIMS "A" AND "C" AGAINST SCHULTHEIS AND PANETTERI, WHICH DID NOT SIGN THE TOLLING AGREEMENT, EXPIRE BY APRIL 30 AND NOVEMBER 6, 2008, RESPECTIVELY.

BACKGROUND

The New York Regional Office of the Employee Benefits Security Administration (EBSA) performed an investigation of the subject benefit plans and determined the existence of violations. For purposes of this analysis only, it is assumed that the violations cited by EBSA are actionable.

The Local 12 Annuity and Welfare Plans (the "Plans" or the "Funds") in this case are a defined contribution and a welfare benefit plan covering between approximately 500 and 800 participants employed in the insulation industry in the New York metropolitan area. Local 12 is headquartered in Long Island City, New York. The Plans have approximately 70 contributing employers. (SOL/JDW telephone conference and e-mail exchange with EBSA/Investigator Castillo, June 8, 2007).

EBSA commenced its investigation of the Local 12 Funds, including the related Pension, Vacation and Education Funds, on February 15, 2002 as a result of a letter complaint dated January 8, 2002 from the Funds' Administrator asserting that Annuity Fund investment returns for the years 1990 to 1999 had not been properly credited to the participants' accounts by the former Administrator. The Funds' Administrator also complained that the former accountant for the Funds, together with his dependents, had improperly participated in the Welfare Plan. (ROI Part I pp. 1 to 3; EBSA/Investigator Castillo e-mail to SOL/JDW

6/12/07). The Trustees filed a civil complaint against the former Fund Administrator and accountant on May 15, 2002 to recoup the improper expenditures. The case was settled for approximately $1,600,000 in March 2004. EBSA kept its investigation files open and continued to work on this investigation (JKay/EBSA e-mail to RSOL/JW 7/09/07). [1]

On November 7, 2005, the NYRO received a letter from participant complaining that his Annuity Plan investment earnings for the 2000 plan year were improperly allocated, and that the proceeds of the settlement proceeds from the Plans' litigation were also improperly allocated in 2004. Prior to the receipt of this letter, EBSA Investigators had not requested or reviewed information respecting the allocation of 2000 earnings and the allocation of the proceeds of the litigation, although other investigations with respect to the Plan had been opened and were ongoing. (ROI Part 2, p. 1). However, they had reviewed the Annuity Fund's 5500s and accompanying financial statements for the 2000-2002 plan years. The year 2000 5500s and accompanying financial statements indicated that the 2000 earnings were not being allocated pending a review by auditors of losses to the plan caused by misconduct of the former plan administrator and auditors from 1990 to 1999. (SOL/JW telecons with EBSA/Inv. Castillo 2/6/08, 3/11/08.) As noted above, the topic of one already pending investigation was the allocation of earnings for the years 1990 to 1999.

There is a tolling agreement in effect between the Secretary, the Union, and the current Trustees, many of whom also served as Trustees when the alleged violations took place. The agreement tolls the running of the statute of limitations on claims respecting "allocation of Annuity Fund's earnings for the year 2000 as employer contributions, the use of Annuity Fund assets to satisfy certain employers' obligations to the Annuity Fund, and the transfers of Welfare Fund assets to the Annuity Fund," from July 17, 2006 to June 30, 2008.[2] The current tolling agreement is the latest in a series of successive tolling agreements commencing with the first one, executed on or about July 17, 2006. The Funds' accountants, Schultheis and Panetierri, refused to sign the tolling agreements.

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[1] Additional Local 12 Funds Investigations were also opened. On October 8, 2002, EBSA opened an investigation of the Pension Plan after a participant made a letter complaint that he was not receiving a pension to which he was entitled. EBSA conducted a preliminary investigation and determined that the participant had not earned sufficient credits to qualify for a pension. On February 14, 2003, EBSA received a complaint from a participant alleging that all of the Local 12 Funds were paying for collection services by Local 12's Business Manager, Fred DeMartino, that he did not perform. In response to this complaint, EBSA revived work on the dormant Pension, Annuity and Welfare Plan investigation files and, on September 3, 2003, opened additional investigation files on the Vacation and Education Fund. (ROI p. 1, SOL/JDW telephone call with EBSA/Investigator Castillo, June 8, 2007.)

[2] A majority of the Funds' Trustees at the time of the alleged violations are still Trustees. Among Trustees at the time of the violations who are no longer Trustees are Carl Pereira, who served from before 2000 to 2005, and Sal Gargiulo and John Solano, who served from before 2000 to December 2003. The remaining former Trustees appear to have resigned in or before 2001, and hence potentially may bear little or no legal responsibility for the violations here. (EBSA/Investigator Castillo e-mail to SOL/JDW 6/8/07).

STATUTE OF LIMITATIONS DISCUSSION

For fiduciary breach actions, ERISA sets forth a three-year and a six-year statute of limitations, and a discovery accrual toll for cases of fraud or concealment.

Section 413(a) of ERISA, 29 U.S.C. §1113(a), provides in relevant part that the statute of limitations for a fiduciary breach or prohibited transactions is the earlier of:

> (a) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date upon which the plaintiff had actual knowledge of the breach or violation. . .
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Each alleged violation referred by EBSA for litigation is analyzed below under ERISA §413's three-year, six-year and fraud toll provisions.

A. A Portion of the Annuity Fund's 2000 Investment Earnings Were Included in a $1,555,604.77 Employer Contribution Transmittal On October 19, 2001 – Alleged Violation of ERISA §§404(a)(1)(A),(B) and (D) and 406(a)(1)(D) and 406(b)(1) and (2).

The ROI alleges that the Funds were harmed when approximately $381,000 in plan earnings for the period September 2000 to December 2000 (plus interest) were added to a transmittal of employer contributions to the Plan. EBSA surmises that this was done possibly to make up a shortfall in employer contributions. This $381,000 was deposited in the Plan's account on October 19, 2001. The $381,000 was never allocated to participants accounts.

The Trustees do not dispute that $381,000 in plan earnings was packaged along with legitimate employer contributions and forwarded to the plan's account. The Trustees assert that this is merely an accounting misunderstanding; the $381,000 was added to a transmittal of employer contributions because a similar amount had been deducted from other employer contributions or other plan assets for payment of accrued expenses.

However, no written record of the alleged expenses was produced to EBSA despite repeated requests therefore. Moreover, such records as EBSA was able to obtain indicate that all accrued expenses, which totaled far less than $381,000, had been paid at the time of this transfer. ROI, Part 2 at p. 5. This suggests the possibility that the $381,000 may have been used to make up for an employer contribution shortfall, as EBSA suggests. Alternatively, because these expenses appear to be undocumented, it may permit the inference that the money was used to pay unnecessary or unreasonable expenses.

In order to assess the running of the statute of limitation on this cause of action, the "breach or violation" must be pinpointed. There are three possible theories for what happened.

Three-Year Rule

Under the three-year rule, this action would be timely under each of these theories if the Secretary had actual knowledge, less than three-years before a complaint is filed in court, of the fact that either the trustees:

1) failed to allocate these earnings to the individual participants' accounts and simply left them in the Plan's account; or

2) added some or all of these earnings to employer contributions to make up for an employer shortfall; or

3) authorized the payment of expenses in a similar amount that were not demonstrably reasonable and necessary for the administration of the Annuity Fund.[3]

Theory # 1 (failure to allocate plan earnings to individual participant plan accounts)

The ROI asserts that no information concerning misallocations in 2000 was reviewed (ROI, Part 2, p. 1) until after Mr. 's complaint on November 7, 2005, which specifically addressed the failure to allocate the year 2000 earnings. This would result in a 3-year bar date of November 6, 2008. However, upon further inquiry, it appears that EBSA reviewed the year 2000 5500 and supporting financial statements for the annuity fund in or about 2002. (SOL/JW telecon with EBSA/Inv. Castillo 2/6/08). This review revealed the auditor's statement that year 2000 earnings were not allocated because of an ongoing investigation into losses caused by wrongdoing during the years 1990 to 1999. Review of subsequent years' 5500s did not reflect anything about the year 2000 earnings. (SOL/JW telecon w/EBSA/Inv. Castillo 3/11/08; e-mail EBSA Castillo to SOL/JW 3/11/08). This raises the possibility that a statute of limitations defense will be asserted arguing that DOL had actual knowledge of the failure to allocate in 2002. However, DOL was not actually examining the 2000 failure to allocate at that time, nor did DOL gain any information subsequent to 2002 to indicate whether or not the allocation had yet been made. If this argument were to succeed, it would result in a 3-year bar date sometime in 2005. That bar would not be revived by the tolling agreement, which was not signed until July 17, 2006.

If the 2000 earnings were never allocated and consequently are still in the Plan's account, then this is arguably a continuing violation of the statute and what EBSA may have known in 2002 is irrelevant.

Theory # 2 (use of plan earnings to make up for shortfall in employer contributions)

With respect to the employer contribution shortage claim, EBSA did not gain knowledge until receiving a letter from New York Life dated 10/20/06 which charted the flow of money. (EBSA/Castillo 2/8/08 e-mail to SOL/JWeekley). Three years would expire 10/19/09.

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[3] It is also possible that a combination of these circumstances occurred.

Theory # 3 (use of plan earnings to pay unnecessary and/or unreasonable expenses)

Finally, there is the possibility that these plan earnings were used to pay unjustified expenses. The ROI and exhibits indicate that EBSA did not gain any knowledge of the expense claim until Schultheis and Panettieri's Heinzman and Fund Administrator Wassell were interviewed on March 6, 2007 and March 29, 2007, respectively. Three years would expire 3/05/10.

2. Six-Year Rule

With respect to the first possible theory for this issue (i.e., that the Trustees merely improperly failed to allocate the $381,000 to the accounts of the employees) the operative date is on or about September 1, 2001, which is the last date that allocation of Plan year 2000 earnings was required to be made, according to EBSA (EBSA/Castillo email to SOL/JWeekley 2/08/08). In that case, the last date to timely file a complaint would have been August 30, 2007. This arguable breach date is within the reach of the tolling agreement (except as to S & P), which freezes the clock at July 17, 2006.

As to the second theory (use of the funds to augment employer contributions), the Secretary's deadline to file an action by October 18, 2007 if the date of the violation is deemed to be the date (10/19/01) that the $381,000 in question was forwarded with employer contributions to the Annuity Fund's contribution account. This arguable breach date is also well within the reach of the tolling agreement (except as to S & P), which freezes the clock at July 17, 2006.

Given the third theory of the case, specifically, that the $381,000 was applied to replace a similar sum spent on alleged plan expenses that could not be documented, the operative date for commencing the running of the statute of limitations is unclear from the evidence and would likely be the date the improper expenses were paid. This date is currently unknown because there were no invoices produced for the alleged services. Alternatively, the operative date could be the date the earnings should have been allocated – September 1, 2001. Finally, and least persuasively, the date could be October 19, 2001, when the $381,000 was transferred to the Plan's account. In these cases, the complaint would be time-barred on a date to be discovered, or August 30, 2007, or October 18, 2007, respectively. But it is clear that the unknown date, if it exists, cannot time-bar the Secretary, since the money could not have been misallocated before it was received; it could not have been received before it was earned; and it could not have been earned before September 1, 2000. (The earnings period for this sum was September-December 2000.) Therefore the six-year period, on the most conservative basis, runs until August 31, 2006. This arguable breach date is within the reach of the tolling agreement (except as to S&P), which freezes the clock at July 17, 2006.

In sum, because the tolling agreement was signed before expiration of the six-year statute of limitations on the claim under any of the theories outlined above, the tolling agreement cannot be said to be improperly reviving an expired claim. However, any claim against Schultheis and Panettieri is time barred by the six-year rule, because they did not sign the tolling agreement.

3. Fraud or Concealment Toll

EBSA's ROI does not point to any special facts or circumstances to support an argument that the fraud or concealment toll applies to extend the statute of limitations here. While witness explanations varied somewhat with respect to the accounting treatment of the $381,000 in question, some conflict, especially when the transactions occurred more than 5 years ago and the accounting issues are complex, does not appear to be significant enough evidence to support the assertion of a fraud or concealment claim. Additional evidence would have to be garnered.

B. The Annuity Fund Trustees Failed to Allocate the 2000 Investment Earnings to Participants in Violation of ERISA Sections 404(a)(1)(A)(ii), (B) and (D), 406(a)(1)(D) and 406(b)(1)(2)

The second cause of action highlighted by EBSA involves the failure of the Fund Trustees to allocate all of the Annuity Funds earnings for 2000 in the amount of approximately $1.8 million, including the $381,000 discussed in Section A, above. Unlike the facts surrounding the $381,000 controversy, there is no doubt, at least with respect to about $1.4 million of this $1.8 million, the potential fiduciary breach here concerns a failure to allocate.[4]

Indeed, the Trustees admit that $1.8 million in earnings for Plan year was not timely allocated. However, they claim this was justifiable because the earnings were used to cover plan losses associated with wrongdoing by former fund employees. The Trustees allege that, instead of allocating the 2000 earnings, they waited until the proceeds of litigation against the wrongdoers were realized in the amount of $1,600,000, and allocated that sum instead in 2004.

EBSA's case rests on its dissatisfaction with the Trustees' demonstration that there were in fact plan losses in the amount of approximately $1.8 million, and that the Plan was so short of cash that the 2000 earnings could not feasibly be allocated until the litigation proceeds were realized. The financial documents produced to EBSA seem to them to indicate that the Plan had adequate assets and could have afforded to allocate the 2000 earnings (ROI Part 2, p. 17). Moreover, EBSA also questions whether the $1.6 million was actually intended to account for the alleged shortfall (ROI, Part 2, p. 17).

1. Three-year Rule

EBSA's ROI states that it did not learn of or investigate any issue pertaining to the 2000 earnings until after it received 's letter complaint on November 7, 2005. (This would result in a three-year bar date of November 6, 2008). As noted earlier, this is not entirely incorrect. EBSA had reviewed the year 2000 5500s and accompanying financial statements in 2002 , which showed that the year 2000 earnings were not allocated. The 5500s for plan years after 2001 and 2002 did not reveal whether or not the year 2000 earnings had yet been allocated. The defense in this case might raise an argument that DOL had actual knowledge of the failure to allocate 2000 earnings by 2002. EBSA might counter that the 2000 earning could have been allocated after 2002, and that it had no knowledge of any ongoing failure to allocate until 's letter in November 2005. If the defenses statute of limitations argument were to succeed, then the claim would be barred by the three-year rule by December 31, 2005. The tolling greement, which was executed in 2006, will not revive the claim.

[4] $1.8 million minus $381,000 is approximately $1.4 million.

Alternatively, let us assume that the year 2000 earnings in fact existed and were in fact allocated to individual participant accounts from the employer contribution account sometime in the year 2004. The failure to attribute the earnings for that four year period to the participants' accounts was disloyal. We do not need to know the exact date when the allocations in 2004 were made. The tolling agreement runs from July17, 2006. Consequently, it captures all activities during the year 2004.

Six-year Rule

The violation here likely occurred in our about September 2001, the last date which EBSA opined that the allocations for the 2000 plan year could properly have been made. Hence, without a tolling agreement, the claim is time-barred by September 2007. With a tolling agreement, the six-year bar date is extended to its expiration. Because Schultheis and Panettieri did not sign the tolling agreement, any claim against them is now time-barred by the six year rule.

3. Continuing Violation Theory

The claim here is for an ongoing violation – that is, if the evidence establishes that the 2000 earnings were in fact never allocated to the present day. As long as a Complaint is filed before the later of November 6, 2008 or the expiration of the tolling agreement, the continuing violation theory need only be asserted if EBSA seeks to sue Schultheis and Panettieri, against whom all claims are otherwise time-barred.

4. Fraud or Concealment Toll

EBSA's ROI and the accompanying exhibit do not provide evidence to support an argument that the fraud or concealment toll applies to extend the statute of limitations here. This is especially true because the year 2000 5500s plainly stated that the 2000 earnings were not being allocated in that year.

C. Annuity Fund Trustees Used Annuity Fund Assets to Augment Contributing Employer Monies That Were Transmitted to Annuity Fund Custodian New York Life In Violation of ERISA Sections 404(a)(1)(A)(ii), (B) and (D), 406(a)(1)(D) and 406(b)(1) and (2)

The ROI states that in March to May 2002, Annuity Plan fiduciaries used Plan assets to augment employer contributions that were allegedly never made. The ROI demonstrates that approximately $650,000 in Annuity Plan assets were deducted from miscellaneous Plan bank accounts and forwarded with employer contributions to the Plan's main investment account on May 1, 2002, and included in a deposit representing "employer contributions" of $1,199,828.59. EBSA has reviewed remittance reports and employer contribution amounts transmitted to the Plan's investment account, apparently quarterly, on October 19, 2001, January 28, 2002 and May 5, 2002. That review appears to point up a discrepancy, for the limited period covered, between the amounts reported by certain contributing employers as due to the Plan, and the amount actually deposited on account of those employers. EBSA concludes there is a shortfall (on the basis of the limited evidence of a comparison of total deposits in a certain bank account with the amount of contributions owed as reported by the contributing employers

during an apparently corresponding period of time), of some $421,000 in employer contributions for companies owned or managed by employer trustees of the Annuity Fund.

Drawing a firm conclusion from this evidence is problematic for several reasons. First, it is unclear whether the time periods examined in fact correspond. Second, it is possible that employers were delinquent and subsequently made up those delinquencies. It is not clear from the ROI if the evidence is controlled for this possibility. Third, certain contributions by employers might have been diverted to pay plan expenses. Fourth, unless payroll audit data is reviewed for evidence of employer delinquencies, or eliminated as a source of additional evidence, the evidentiary picture here would appear to be incomplete. The ROI indicates that Schultheis and Panettieri was performing payroll audits for the Annuity Fund during the period in question. This information should be available.

If the Secretary's claim were to be that the responsible fiduciaries improperly augmented employer contribution transmittals when they deposited $1,199, 898.51 on May 1, 2002, then that date would be deemed to be the date of the violation.

1. Three-year Rule

If actual knowledge of the breach was acquired when EBSA received Funds bank records from Citistreet on 3/14/07 (EBSA/Castillo email to SOL/JWeekley 2/08/08) then the three-year statute would not expire until March 13, 2010 or such later date as EBSA acquired "actual knowledge." In addition, the tolling agreement saves any claims as to the Trustees (not Schultheis and Panettieri because they refused to sign) from July 17, 2006 through its expiration.

2. Six-year Rule

Without a tolling agreement, under the six-year rule, the Secretary can reach only those plan losses and violations that occurred no more than six-years ago—or from early-2002 to the end of the period covered by the investigation. The violation here appears to have occurred on or about May 1, 2002. Thus, the six-year statue would expire on April 30, 2008. However, the tolling agreement extends that period to its expiration. Any claim against Schultheis and Panettieri, which did not execute the tolling agreement, is time barred on April 30, 2008.

3. Fraud or Concealment Toll

EBSA suggests that certain misrepresentations and concealments of misconduct may have been involved. If so, the fraud or concealment toll might apply to extend the statute. However, without additional substantiating evidence such as witness testimony, assertion of such an argument is not recommended.

D. The Trustees Allegedly Transferred Monies From the Welfare Fund to the Annuity Fund for Non-Fund Related Purposes In Violation of ERISA Sections 404(a)(1)(A),(B) and (D), 406(A)(1)(D) and 406(b)(1) and (2)

and Panetteri. However, because the firm did not execute the tolling agreement, it will expire on April 30, 2008.

Jennifer D. Weekley
Attorney

I concur,

Patricia M. Rodenhausen
Regional Solicitor

2-22

Castillo, Jose - EBSA

From:	Kay, Jonathan - EBSA
Sent:	Wednesday, April 02, 2008 3:36 PM
To:	Weekley, Jennifer - SOL; Kade, Dennis - SOL; Goldberg, Robert - EBSA; Castillo, Jose - EBSA
Subject:	Local 12 ---Par t2--Issue C re: employer contributions

I would like to schedule a teleconference for Jennifer to explain what her concerns are with the documentation in support of this issue and for Jose to have an opportunity to respond. The exchanges to date have not resolved the issue for me, at least, and I think a live discusssion would be helpful. Could each of you indicate when you are avaailable on Thursday or Friday other than 2-3pm on Thursday or Friday 10-11am on Friday.

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

stillo, Jose - EBSA

.om: Kay, Jonathan - EBSA
Sent: Friday, April 04, 2008 9:33 AM
To: Kade, Dennis - SOL; Weekley, Jennifer - SOL
Cc: Goldberg, Robert - EBSA; Castillo, Jose - EBSA
Subject: Local 12 question

Attachments: Local 12 question on del employer contrib.doc

Here is a draft of the issue we spoke of yesterday. Please provide any comments you may have?

Local 12 question on del emplo...

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

April 4, 2008

To: Jeffrey Monhart
Chief, DFO

From: Jonathan Kay
Regional Director/NYRO

Re: Local 12 Asbestos Workers Annuity Fund
Case No.: 099939(48)

As you are aware, this and companion cases involving other plans sponsored by Local 12 have been referred to the NYRSOL for litigation consideration. During a teleconference with NYRSOL yesterday an issue arose on which we seek guidance from ORI. We therefore ask that you forward this matter to their attention with a request for a prompt response.

The issue that we seek guidance on concerns the above-referenced multiemployer, defined contribution plan that is funded by contributions from employers. Specifically, would it be prudent for the trustees to allocate to participants accounts monies in the forfeiture account, earnings on plan investments or employer contributions to make up for un-remitted employer contributions regardless of the fact that the forfeiture account, earnings and/or contributions may have been attributable to participants other than those employed by the delinquent employer? Would the answer be different if the forfeited funds, earnings or contributions could be associated with participants that were employed by the delinquent employer? The rationale for permitting this type of transaction might be that the trustees have a duty to protect the interests of all participants and could, in furtherance of that duty, use funds that were associated with participants that were not employed by the delinquent employer.

stillo, Jose - EBSA

From: Castillo, Jose - EBSA
Sent: Monday, April 07, 2008 8:27 AM
To: Kay, Jonathan - EBSA; Goldberg, Robert - EBSA
Cc: Kade, Dennis - SOL; Weekley, Jennifer - SOL; Castillo, Jose - EBSA; Monhart, Jeff - EBSA; Smith, Virginia - EBSA
Subject: RE: Local 12 question

Jonathan

First of all , your request for guidance from Jeff Monhart is incomplete and could result in a huge misinterpretation.

Jeff needs to know that the so called delinquent employers you are referring to here are employers that are owned or controlled by the employer trustees.

You need to explain to Jeff that these trustees controlled employers , according to the records, are credited of transmitting $1,006,666.55 contributions to the custodian, New York Life, however, the actual contributions received from these trustees controlled employer, according to the records is only $585,216.71.

So in other words, $421,449.84 monies which may be composed of forfeiture accounts, earnings and/or contributions from other non delinquent employers and of course, plan assets (based on the records) were used to make up for these contributions. Remember page 20 to 21 of the ROI part II illustrated that the Fleet bank Account also included the $700,000 matured CD and the $5,499,997 monies that were already plan asset by years 1999 and 2000.

And, monies to do these remittances from taken from the Fleet Bank Accounts.

Respectfully

Jose Castillo

From: Kay, Jonathan - EBSA
Sent: Friday, April 04, 2008 9:33 AM
To: Kade, Dennis - SOL; Weekley, Jennifer - SOL
Cc: Goldberg, Robert - EBSA; Castillo, Jose - EBSA
Subject: Local 12 question

Here is a draft of the issue we spoke of yesterday. Please provide any comments you may have?

<< File: Local 12 question on del employer contrib.doc >>

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
F 212-607-8689

stillo, Jose - EBSA

From: Castillo, Jose - EBSA
Sent: Monday, April 07, 2008 10:17 AM
To: Kay, Jonathan - EBSA; Rodenhausen, Patricia - SOL; Kade, Dennis - SOL; Weekley, Jennifer - SOL
Cc: Chao, Elaine; Campbell, Bradford - EBSA; Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA
Subject: RE: Local 12 Plan Document

For the record.

Sure I will again provide you with one.

I made this available to Jeff Gaynor back in April 2006 after we interviewed Schroeder. As I stated a number of times before, he never reviewed it. He said to me he did not have the time.

The plan document is always in my case file since 2002 or 2003.

Bob Goldberg never bother to ask me for it.

However, in November of 2006, after I made a discovery that $381,099 of investment earnings for 2000 was used by the Plan Administrator to "offset" employer contributions monies for contribution transmittal dated 10/19/2001) Issue No. 1, Exhs. 98 and 99, ROI Part II, You., Goldberg and Gaynor asked me for a copy of it. I provided you guys with copies.

Both Goldberg and Gaynor stated to me that we needed to review the plan document to see if it allows that used of plan assets as employer contribution "offset."

requested copy of the plan document and athe CBA. I gave you one. (Just my opinion, I thought you reviewed it to see if it allows the use of plan assets as employer contributions "offset"). See your email dated 11/8/2006, 9:16 AM.

Well, I am sure you three guys reviewed it, and off course , there is nothing in the plan document that allows the use of plan asset as employer contribution "offset."

And, off course, since May 1998,. When I started as a Benefit Advisor, I already started reviewing plan documents.

And, of course, it was my first time to review plan documents. Howver, being of non-commissioned officer, I am well experienced in reading and reviewing manuals for rules and regulations. I did it for close to 20 years of active and reserve duty in the US NAVY. I even have experienced reviewing Department of State rules and regulations and Status of Force Agreements (SOFA) between the US Navy and countries of Italy, Spain and Portugal after stationed overseas.

Well, since 1998, when I started as a Benedit Advisor, I have never run into a provisions of any plan documents, that allow plan assets to used as employer contributions or any thing that seems to show the use of plan asset monies for the benefit of an employer or sponsor.

And, in one of his PHONE CALLS TO ME BACK IN 2006, he in fact guided me to the page of the the plan document where the allocation rules is stated.

When Jeff Monhart was here, I told him of this scenario. He made a comment something like this, " If it is true, what a plan it is, right Jeff?

Respectfully

Castillo
.or

From: Kay, Jonathan - EBSA
Sent: Monday, April 07, 2008 9:24 AM

To: Castillo, Jose - EBSA
Subject: Local 12 Plan Document

Could I get a copy of the plan document.

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

stillo, Jose - EBSA

From:	Castillo, Jose - EBSA
Sent:	Friday, April 18, 2008 5:26 PM
To:	Kay, Jonathan - EBSA; Kade, Dennis - SOL; Weekley, Jennifer - SOL; Goldberg, Robert - EBSA
Cc:	Chao, Elaine; Campbell, Bradford - EBSA; Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA
Subject:	Local question on del employer contri
Attachments:	MemoBettyMartin08.doc; Local 12 question draft.doc


MemoBettyMartin08 .doc (24 KB) Local 12 question draft.doc (2...

THE HONARABLE SECRETARY

AND
Gentlemen and Ladies

For the Record:

Attached is the inteview I obtained from Ms. Betty Martin, Office Manager and Bookkeeper of I & I Contracting, Inc. a contributing employer to Local 12 Funds.

The process of remitting employer contributions to the Fund office clearly shows that each of the I & I Contracting employee is being rightfully credited the number of hours worked and the corresponding dollar amount they are entitled to during a given pay period.

ıe Number 3 of ROI. Part II shows that a number of contributing employers that are ..ther OWNED OR CONTROLLLED BY THE TRUSTEES OF THE FUND remitted a lot less monies to the Fund office AS contributions compared to the monies transmitted by the Fund office to the financial custodian (New York Life) as EMPLOYER CONTRIBUTIONS ON behalf of these companies. For the three contribution transmittals investigated, the gap is $421,449.84.

The $421,449.84 has to come from somewhere. My ROI did not mentioned if there are employer contribution delinquencies because my investigation only showed minor delinquencies and the trustees controlled employers were NOT DELINQUENT.

The real issue here is that $421,449.84 monies that are NOT EMPLOYER CONTRIBUTIONS MONIES WERE USED BY THE TRUSTEES to cover the three employer contribution transmittals done on their behalf.

The way I understand it, the issue that the RD wants guidance from ORI (attched) if it is prudent for the trustees to allocate employer contributions, etc. from non-delinquent employers to employees of delinquent employers,HOWEVER, the draft did not mention that these employers are controlled by the trustees.

If the allocation of contributions from non-delinqent employers to employees of delinquent employer is permitted, THE EMPLOYEES OF NON-DELINQUENT EMPLOYERS WILL NOT RECEIVED THEIR BENEFIT CREDITS, THE MONIES THAT SHOULD BE IN THEIR ACCOUNTS WOULD BE NOT THERE AND THEY WILL LOSS INVESTMENT OPPORTUNITIES AND INTEREST. The process as described by Ms. Martin is self explanatory.

This is not an acceptable scenario and it is fraud.

CAME UP WITH THIS SPIN??
AGENCY WILL ACCEPT THIS??

Respectfully

- se Castillo
itor

Memo to File

April 17, 2008

From: Jose Castillo
Investigator

I interviewed Ms. , Bookkeeper and Office Manager of . The company located at is a contributing employer to Local 12 Asbestos Workers Funds. The phone number is . Ms. is an employee of this company for the last twenty years.

Ms. stated that the process of remitting employer contributions to the Fund office is as follows:

Checks are issued to each Fund (meaning, Annuity, Pension, Welfare and Education Funds) and mailed to the Fund office. Attached to the checks are the transmittal listings showing each employee of the company, hours worked and the amount intended for each employee.

Ms. further stated that she never mails employer contribution checks to the Fund office without the attached listing.

2-23

U.S. Department of Labor

Employee Benefits Security Administration
33 Whitehall St., Suite 1200
New York, NY 10004
Phone: (212) 607-8600
Telefax: (212) 607-8681

May 20, 2008

To: Jose Castillo
Auditor/NYRO

From: Jonathan Kay JK
Regional Director/NYRO

This memo is to counsel you regarding certain improper conduct you demonstrated on May 15, 2008 at approximately 3:30 pm in my office. At that time you, Group Supervisor (GS) Robert Goldberg and I were discussing the Local 12 Asbestos Workers employee benefit plan cases. You have been the investigator on these cases and for approximately the past two years GS Goldberg has been your first line supervisor on these cases. During our discussion you claimed that GS Goldberg had previously stated to you that the Local 12 case would not pass the "smell" of litigation, or words to that effect. I understood that you viewed the purported statement to mean that the investigation findings, or some aspect of the findings, would not survive the test of litigation.

GS Goldberg denied that he made such a statement. You immediately accused GS Goldberg of being a "liar." At that point, I told you that you should not use such language. You then said, "That's what he is, a liar." I then stated that I will not have such language used. You repeated at least one more time that GS Goldberg was a "liar." At this point I told you to leave my office which you did.

There have been numerous conversations between you and GS Goldberg regarding the Local 12 cases over the past two years. As a general matter, from time to time, people will disagree about whether events, including conversations, occurred. However, when such disagreements occur within the scope of your work as an Auditor for EBSA it is expected and widely-understood that such disagreements, if discussed, will be discussed civilly and professionally. There is no justification to resort to offensive, hostile and disrespectful language. By repeatedly calling GS Goldberg a "liar", you violated those expectations and the norms of professional discourse.

I am directing that you refrain from using disrespectful and unprofessional language in your oral and written communications with all members of the NYRO staff and anyone that you come in contact with during the course of your official duties with EBSA. Any further similar episodes will be grounds for disciplinary action. I strongly suggest that you consider enrolling in a conflict management course and/or contacting Employee Assistance Program to pursue counseling. Fred Pryor is sponsoring an all-day course entitled "Managing Emotions Under Pressure" on May 22, 2008 in midtown New York. Other courses are available. Pryor also has an audiotape series entitled "Dealing With Conflict and Confrontation." Please let me know if you are prepared to participate in any of these courses and the office will pay for one of them. Additionally, EAP may be reached at 1-800-222-0364.

JK 23

U.S. Department of Labor

Employee Benefits Security Administration
33
New York, NY 10004
Phone: (212) 607-8615
Telefax: (212) 607-8681

May, 20, 2008

To: Jonathan Kay
Regional Director/NYRO

From: Jose Castillo
Auditor/NYRO

This memo is to respond to your memo dated May 20, 2008, the purpose of it is to counsel me regarding certain improper conduct I demonstrated on May 15, 2008 towards my ***special supervisor Robert Goldberg**. I explain to you on 1/24/2008 meeting with Jennifer Weekley of the SOL regarding Local 12 Annuity Fund, he stated to me **not once** but at least **three or four times** that Issue no. 2 of ROI, Part II (non-allocation of the 2000 investment earnings) "does not pass the smell of going to court". I stated to you that this is the first time I heard this phrase.

The next day, 1/25/2008 at around 10:00 AM, I went to his office and asked him what did he said about something like does not pass the smell. He responded by saying that he stated "does not pass the smell of going to court" on issue number 2.

Your memo stated that I said "That's what he is, a liar". . My exact word is "Bob you are lying" when he denied making the above statements back in 1/24/2008.

I repeated to you today what I said to Robert Goldberg back on May 15, 2008.

You are saying that my statement constitute a disrespectful and unprofessional language.

I completely and strongly disagree. My statement on May 15, 2008 constitutes a statement of facts. The way you phrased what I said is **not correct.**

When I say, "James Heinzman, the auditor for Local 12 Annuity Fund, was lying when he made statements to me and Investigator Robert Trujillo back then **does not** constitute disrespect and unprofessional behavior. It means I am stating the facts the way I looked at it.

Your memo **failed to mention** the first issue that was discussed that **led me to say what I said above.**

The issue of the two million cash with Fleet Bank. Goldberg stated that the key is to find out what happen to this cash. He seems to show that he does not know what happen to this cash. The ROI, Part II clearly explained what happened. It is supported by bank statements and copies of the checks issued. He spent many days editing my ROI and I showed him for the first time the hard copy documents mentioned above. **How could he suddenly not remember it?**

As you remember, when I confronted him about this statement, he immediately said that on the ROI, "you are contradicting your self." He made an explanation or illustration about the ROI that does not make sense.

So, in other words, assuming that my writings in the ROI about this $2 million issue are contradictory, **how come he did not correct me? He let it go.**

How come he did not asked me to prove my point? He is supposed to be my **supervisor.**

Your memo is directing me to refrain from using disrespectful and unprofessional language in my oral and written communication with all members of the NYRO staff and anyone that I come in contact.

I believe you are **overstretching** your statement here and seem to indicate that I am the type of person that uses this alleged language **to others.** Tell me who in the NYRO staff can testify that I am the type of person that uses this language.

- Robert Goldberg is not my real supervisor. He was assigned by the Regional Director specifically to supervise me on the Local 12 Funds cases. He started as the "special supervisor" in March 2006. The RD stated that his reason for assigning Goldberg as my supervisor is because my real supervisor is not familiar with Local 12 Funds complicated issues. He also directed the now retired Deputy Regional Director (Jeff Gaynor) to assist Goldberg in supervising me.

- My real supervisor, Nichele Langone was not familiar with the issues of Local 427 and Local 1175 Funds cases either. Yet, she successfully supervised me.

- The RD cannot explained to me why Goldberg and Gaynor, both of whom are trained and experienced **accountants/auditors** never bothered to review my evidence which are **90 percent** accounting issues. Yet, they disagreed with my findings **strongly.** At one point, I put all these evidence on Gaynor's desk. It stayed there for a number of weeks and later when I asked him if he reviewed it. His answer was "I did not have the time".

- I informed the RD that I made notes on a number of instances where Goldberg openly disagreed with my findings/statements in **front** of the counsels of Local 12

trustees during settlement conferences. He did this despite having not seen the documented evidence I am referring to. **Is this supposed to be his role?**

- Both Gold berg and Gaynor became aware **May 2006** of my allegation that the investment earnings of $1.8 or $2 million were not allocated to the participants as directed by the trust/plan document. I even stated to Goldberg before I made the May 2006 summary that the investment earning for 2000 of the Annuity Fund was **"hijacked".** The RD, Goldberg and Gaynor strongly disagreed with my findings. Yet, they **all did not bother** to ask me what kind of audit work papers/accounting records I can show to prove it.

- **The criminal statue of this issued expired** without being looked at since these three people above me are not convinced of my findings.

The above statements and the facts presented by bullets are true and correct and I am willing to testify in court under oath if needed for its truthfulness and validity.

5/20/08

JOSE CASTILLO

Respectfully

2-24

July 31, 2008, August 7-8, 2008

Memorandum To: File

Memorandum From: Robert Goldberg, NYRO Supervisory Investigator
Jennifer Weekley, SOL Trial Attorney

Subject: Meeting With Local 12 Annuity Fund Counsel, Union and Employer Trustees' Counsel and Fund Accountant Regarding the Issues In The Report of Investigation On The Local 12 Annuity Fund and the DOL/SOL Letter to the Trustees' Counsel Dated June 5, 2008

On the above date, Robert Goldberg from EBSA, Jennifer Weekley, Esq. from NYRSOL, Denis Engel, Esq. from the law firm of Colleran, O'Hara & Mills LLP (counsel for the Fund and for the Union Trustees), Ira Golub, Esq. and Kerri Blumenauer, Esq. from the law firm of Proskauer Rose LLP (counsel for the Employer Trustees), and James Heinzman, CPA from the accounting firm of Schultheis and Panettieri (the Fund Accountant) had a meeting to discuss the issues in part 2 of the NYRO investigation on the Local 12 Annuity Fund.

The first item discussed was the first issue set forth in DOL's June 5, 2008 letter to the Trustees' counsel regarding the allegation that the Annuity Fund Trustees used a portion of the Annuity Fund's 2000 investment earnings as a part of the $1,555,604.77 employer contribution transmittal dated October 19, 2001.

Weekley indicated that it has been stated to the Department that $381,099 (the portion of the 2000 investment earnings referred to above that was sitting in the New York Life Stable Value Fund, an Annuity Fund account, which was included in the $1,555,604.77 employer contribution transmittal memo dated October 19, 2001) was used to pay Fund expenses. Weekley added that this information had been provided to the Department during several interviews that the Department had conducted. Engel indicated that this was incorrect and that there must have been some misunderstanding by the Department. Specifically, Engel posited that any answers were given generally to the question of what Fund assets were used for. (See Statements of Heinzman, Wassell and Engel given to EBSA, Inv. File Exs. 106, 107, 108 indicating that the $381,000 was likely used for plan expenses.)

Heinzman indicated that in order for the Annuity Fund to become self directed at New York Life by the end of June 2001, participant account balances had to be funded (total money had to equal the total participant account balances). Heinzman indicated that he looked at the total participants' account balance and compared that amount to Fund assets to see how much money the New York Life account needed to become self directed.

24 24

After seeing that most of the Fund's assets were already sitting in New York Life, Heinzman indicated that he realized that additional money was necessary to have enough money to cover the participant account balances. Consequently, in June 2001, $2,561,898 was transferred from the trustee directed Fund accounts to the Fund account at New York Life. Part of this transfer included a portion of the January through June 2001 employer contributions that were sitting in a Fund trustee directed account. When the transfer of the January through June 2001 employer contributions totaling $1,555,604 occurred on October 19, 2001, it was decided that the $381,099, that was sitting in a trustee directed account at New York Life, would be used to make up employer contributions that were used as part of the June transfer. The appropriate participant accounts were properly credited with the January through June 2001 employer contributions totaling $1,555,604.

In explaining what happened to the $381,099, Heinzman provided the Department with a sheet that contained two schedules that he created showing the activity that occurred in 2001. The first schedule showed what actually occurred with the $381,099. This schedule showed that the $381,099 was part of the January through June 2001 contribution transfer in October 2001 to make up for contributions that were used in June 2001 when the Annuity Fund became self-directed. The second schedule showed that if he had to explain what actually occurred in 2001 in another way, the $381,099 was included in the $2,561,898, which was the amount needed to completely establish the accounts at New York Life in June 2001.

Counsel for the Trustees' explanation for the use of the $381,099 was that the Fund monies were essentially fungible among the various accounts. Essentially, the Trustees contend that the $381,099 was used to allow the Fund to switch to a self-directed platform.

Counsel for the Trustees also stated that issues one and two were closely linked and that the explanation of cash flow in item one of DOL's June 5, 2008 letter to the Trustees' counsel was further clarified by their explanation of item two.

The next item discussed was the second issue set forth in DOL's June 5, 2008 letter to the Trustees' counsel regarding the allegation that the Annuity Fund Trustees failed to allocate the 2000 investment earnings to participants.

Engel indicated that the first time that the Fund Trustees realized that there was a problem was in early 2000 when the Fund Trustees saw that there were discrepancies in the investment income earned between the 1999 year end reports from the Fund's Investment Advisor Reynolds Securities and the financial reports prepared by the old Fund accountant Robert Weinstein, from Lawson, Holland & Co. P.C.

Weekley indicated to Engel that there was no mention of this discovery in the Board of Trustee Meeting Minutes on March 22, 2000, as it was stated in his letter dated September 29, 2006. Weekley provided Engel with the Board of Trustee Meeting Minutes dated March 22, 2000. Engel could not give an explanation of why there was no

discussion of this discrepancy in the minutes, other than not everything discussed at a Trustees meeting is set forth in the minutes.

Engel indicated that the accounting firm of Marcum and Kleigman was hired to try to find out why there was this discrepancy. Marcum and Kleigman provided the Fund Trustees with an incomplete report and did not find the extent of the problem. In addition, the Trustees' counsel indicated that Marcum and Kleigman billed the Fund without performing (or improperly performing) tasks that were contracted for. After they were fired, Schultheis and Panettieri were hired to perform the 2000 plan year audit and try to find the extent of the problem. Schultheis and Panettieri already had been doing the Fund payroll audits. In the Fund's 2000 audit report, a note in the financial statements indicated that there were potential discrepancies that were being reviewed.

Heinzman stated that since the Annuity Fund was becoming self-directed in June 2001, a proper history of the Fund needed to be made from December 31, 2000 to June 2001. He realized that the total participants' account balance was more that total available Fund assets. Heinzman indicated that he later discovered that participant accounts were misallocated, some participants received larger distributions than what they were supposed to, and the former Fund Administrator Jerome Market and former Fund Accountant Robert Weinstein had stolen money from the Annuity Fund. Market and Weinstein covered this up by recording improper administrative expenses. Heinzman stated that it was determined by late 2001 when his firm completed its review that the above actions resulted in the Fund having a shortfall of approximately $1,900,000. The Fund Trustees determined that earnings that had been earned in 2000 (approximately $1,800,000), which had always been sitting in Annuity Fund accounts, would be used to cover almost the entire shortfall. The only way that this could be done was to not allocate the 2000 earnings to participant accounts. The Fund Trustees thought that if the Annuity Fund would subsequently receive any money from the lawsuit that was filed against Market and Weinstein and from the insurance carriers (including any payment from the fiduciary carrier for the distribution overpayments), then that money would be allocated to participant accounts. (In fact, the litigation recovery approximating $1.3 million was allocated to participant accounts in 2004).

Heinzman stated that he compared the Fund's assets to Fund participant accounts to try to locate the differences. The earnings in previous years' financial statements did not match up with what was reported by the Fund's investment custodian.

Schultheis and Panettieri performed a ten year interest analysis to determine what the participants should have received in their participant accounts. They looked at each participant's account for the ten year period. Schultheis and Panettieri determined what the participants should have received when distributions were made to them. Schultheis and Panettieri were only able to go back to 1993 because that was the earliest time the Fund had adequate records.

Goldberg asked Heinzman whether the financial statements prepared by the old Fund Accountant Robert Weinstein (before plan year 2000) were incorrect. Heinzman

indicated that the financial statements were incorrect as far as improper Fund expenses and Fund participant account balances. The participant balances and Fund expenses were deliberately skewed, but the assets in the Fund were properly represented (including the losses due to theft) in those financial statements and additional financial statements in subsequent years.

Goldberg asked Heinzman: when one looks at the 2000 financial statements it appears that the Fund had more assets than what the participant accounts had listed. Heinzman indicated that that is not correct. Whatever cash the Fund had was listed in the financial statements, however, the assets listed in the financial statements included non-available cash like loans receivable and other non-cash items like other receivables and payables. Heinzman stated that if you subtracted the receivables (including loans) and payables, the available cash was lower than participant account balances.

Goldberg asked Engel when Fund participants were officially informed of the shortfall. Engel indicated that a letter was sent out to Fund participants in the beginning of 2002 stating that participant accounts were inaccurate. The Trustees' counsel confirmed that the existence of the shortfall due to prior employees' misconduct was (also) disclosed to participants in a power point presentation given at the Radisson Hotel in 2004.

Goldberg asked Engel whether the shortfall and actions to uncover the problems were discussed at Board of Trustees meetings and were included in Board of Trustees meeting minutes. Engel stated that he thinks they were discussed and these discussions were included in the meeting minutes.

Goldberg asked Heinzman why there was a discrepancy with the participant loans receivable amount between New York Life's records and Fund's financial statements. Heinzman indicated that the loans receivable amount in the New York Life's records was much higher than what was listed in the financial statements because New York Life includes all loans historically that were in default. This is being done by New York Life for tax purposes.

Goldberg and Weekley asked specifically about a $1.5 million sum in the Fund's accounts at approximately the close of 2000, which appeared to be surplus assets. Engel stated that this money was not a surplus asset but was employer contributions that had to be credited to individual participant accounts. Goldberg and Weekley also asked specifically about a CD at Citistreet valued at approximately $612,000. Counsel stated that said CD matured in early 2000 (apparently before the earnings at issue had accrued). Counsel denied that the CD could be considered to be excess assets. Counsel provided a copy of an Annuity Fund checking account statement dated March 31, 2000 purporting to reflect a deposit of @$612,000 on March 15, 2000 and the Notice of the CD's maturity dated March 15, 2000. (Copies attached.)

Engel explained that the Trustees were trying to solve a number of problems simultaneously: 1) money was missing from the Funds; 2) the account balances were not accurate and the Trustees did not know if the account balances were high or low; 3)

whether the Trustees had sufficient assets to cover the existing account balances if the 2000 earnings were used to cover existing account balances and whether any insurance/litigation proceeds would be subsequently distributed to participants to allocate those earnings. Engel explained that the Trustees did the best they could do in the circumstances when they did not know how much money had been stolen or misapplied by the prior Fund personnel.

Weekley asked why the Trustees made the decision in 2000-2001 to offer the participants self-directed investment options. Engel replied that the Trustees/union/employer officials had been discussing the option with participants for some time, the participants were clamoring for the option, and at the time, the financial markets were so upward bound that participants believed that they could make greater returns and could not loose with self-directed investments.

The next item discussed was the third issue presented in the June 5, 2008 RSOL letter to the Trustees regarding the allegation that the employer Trustees' companies were not paying the contributions owed and were subsidized by Fund assets. The Trustees' counsel contend that all contributions owed, as reflected in the corresponding remittance reports during the time periods in question, were made and that DOL's records of the checks deposited must be incomplete. Counsel categorically denied that Annuity Fund assets were used to make up employer contribution shortfalls and that there were any contribution shortfalls by the employers cited in DOL's June 5, 2008 letter. Counsel stated that only one employer Trustee's business was ever delinquent --- -- and this delinquency/ies was duly noted in the Fund's delinquency reports. is no longer a Trustee and has not been for some years, according to counsel.

Counsel confirmed that deposit records are available in the Fund office for all contributions due as reflected in the remittance reports for the period of EBSA's investigation, including check numbers, but that cancelled checks are not available in the Fund office because these would have been returned to the employers. The cancelled checks may be available from the individual employers in question, but counsel was unable to confirm that.

Engel indicated that the Fund's bank should have a record of the front of each check deposited.

Counsel stated that some employers made their contributions to the Annuity Fund directly. Others paid one check to the Welfare Fund for all contributions due to all of the Funds. The Fund then apportioned the sum among all the Funds. Counsel did not know of instances where one employer used both payment methods at the same time, but there were instances where employers switched methods during one year, according to counsel.

The Trustees are very willing to supply DOL with any additional documentation needed to clarify this issue, including deposit records. They will await DOL's request for documentation, which DOL will frame and forward to them.

With respect to the fourth and final issue set forth in DOL's June 5, 2008 letter to the Trustees' counsel regarding unexplained transfers totaling $1.2 million from the Welfare Fund to the Annuity Fund, Counsel explained that these transfers were the reapportioning of employer contributions made to the Welfare Fund by one check representing contributions due to all of the Funds, including the Annuity Fund.

As an example, Counsel presented evidence (copy attached), compiled by Heinzman, summarizing the contribution checks deposited into the Welfare Fund account on October 23, 2001, but applicable to all the Funds. The evidence included a copy of the October 23, 2001 deposit ticket into the Welfare Fund's account of $98,091.91 and the Welfare Fund's bank statement reflecting that deposit.

The evidence also included a summary of the allocation of each deposit, with the summary made from the Fund's original "posting report." The evidence also included statements derived from the Fund's Transaction Journal and General Ledger demonstrating the deposit into the Annuity Fund of the approximately $31,000 out of the total of $98,091.91 due to the Annuity Fund from the Welfare Fund.

The Trustees provided an example of the paper trail that would be used to track an Annuity Fund deposit among over one hundred deposits during the period in question. The Trustees are very willing to provide additional documentation but noted that it took one hour of the accountant's time to document the October 23, 2001 transaction. They will await DOL's request for additional documentation, which DOL will frame and forward to them. (Note: due to statute of limitations constraints, only the final deposit cited by EBSA – January 8, 2002 in the amount of $316,000 ---is still potentially recoverable. Any request for additional information should be limited to this deposit.)

Weekley asked the Trustees counsel what it is that participant Schroeder is seeking. Counsel stated that he sought to retain overages misapplied by the prior Fund personnel as well as his portion of the proceeds of the insurance settlements.

In summarizing the content of the meeting, the Trustees' counsel stated their belief that all allegations in the DOL's June 5, 2008 letter are meritless. They further stated their willingness to cooperate fully in providing any information or documentation necessary to aid in resolving the case.

2-25

stillo, Jose - EBSA

From: Castillo, Jose - EBSA
Sent: Thursday, November 20, 2008 4:44 PM
To: Goldberg, Robert - EBSA; Kay, Jonathan - EBSA
Cc: Ackerman, Jean - EBSA; Weekley, Jennifer - SOL; Kade, Dennis - SOL; Rodenhausen, Patricia - SOL; Chao, Elaine; Campbell, Bradford - EBSA; Ruiz de Gamboa, Nancy - OIG; Heddell, Gordon - OIG; Petrole, Daniel - OIG; Watson, Sharon - EBSA; Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA; Langone, Nichelle - EBSA
Subject: Local 12 Annuity Fund

Attachments: Issue no.1.pdf; Issue no.2.pdf

Issue no.1.pdf (122 KB) Issue no.2.pdf (69 KB)

For the record:

Yesterday, 11/19/2008 we discussed again Local 12 Funds issues.

And again, you strongly disagreed with my findings on the four issues (ROI, Part II).

But, you have completely NO DOCUMENT TO SUPPORT your disagreement, not even ONE PAGE.

To me this is misconduct on your part. Since you become the "special supervisor" on Local 12 Funds, you were NEVER CORRECT.

, tell me of any situation where you prove me wrong. NONE.

Remember ROI, Part I. You strongly disagreed with me, however you have nothing to show I was incorrect or you are correct.

Remember on Part I, they settled because they can not provide me with any document to disprove my allegations.

Now, Part II.

Bob, if you want to prove that I am incorrect, present it to me with documentation. You are always welcome to use my Referral files. All the source document to support my allegations are here. Free to use it and prove my wrong.

I have a serious problem when you keep on saying all these theories and assumptions without any valid documents to prove its correctness.

All your theories and assumptions always point to supporting the undocumented claims of these well-connected and high priced counsels of the trustees.

Participant told the FBI that our office was bribed to make this investigation irrelevant.

I was asked by the agent "if in theory people above me are bribed". My answer was "if it is in theory, yes its possible"

behavior since November 2005 until yesterday is highly questionable.

Your goal is to make the issues go away.

You absolutely have no document to prove your theories but you keep on arguing for it.

So, you are free to review all the source documents. Then prove it to me.

believe you actions are gross misconduct.

Attached are (1) documents to prove that on June 2001, the Fund would not be underfunded if the $381,099 investment earnings was allocated. The undocumented claim of Heinzman is that if this money was not used as an employer contribution, the Fund would be underfunded.

Participants' account balance as of 6/20/2001 is $46,607,942.91. Total plan assets with New York Life is $47,931,470.14.

Add the two Flett bank account of $387,828.34 and $323,077.45.

(2) Are documents to prove that there was no shortfall by December 31, 2000. The claim is that there was a short fall.

Short fall means, total participants account balance is more that the total net assets available for benefits.

Participant account balance as of 12/31/2000 was $46,686,166.

Plan assets with New York Life is $48,287,657.53. Add the two Fleet bank accounts and Citibank account -$1,120,469.93. , $315,898.86 and $67,057.43.

Yesterday, you stated that you have not reviewed the source documents on my exhibits. Well, I suggest you review it.

Any they are all attached.

Bob if you can find documents to contradict these documents, then you are completely correct.

However, if you keep insisting that I am incorrect and your theories are correct, then you are undermining my investigation.

Respectfully

Jose Castillo

BENEFIT [redacted] SERVICES

June 19, 2001

PRIVATE & CONFIDENTIAL

Mr. Al Wassell, Jr.
Asbestos Workers Local 12
25-19 43rd Avenue
Long Island City, NY 11101

Re: The Asbestos Workers Local 12 Annuity Fund

Dear Al:

I am writing this letter to explain how each Members account will be split based on the 70-30% allocation.

1. The earnings from 9/1/00–12/31/00 of $374,768 will be placed in a Suspense Account invested in the Stable Value Option. The money will remain in that account until NYLB receives a file from Local 12 instructing NYLB how to allocate it to the Members. NYLB will not allocate any earnings to this account for the period of 1/1/01 through current date. However, interest will accrue in this account going forward.

2. NYLB will allocate earnings from the Local 12 Core Fund to Member accounts for the period of 1/1/01 through current date on a pro-rata basis.

3. 30% of each Members current Core Fund balance will be transferred from the Self-directed Core Fund to the frozen Core Fund. Please note the following:
   - 100% of the current Core Fund balance will be transferred to the frozen Core Fund for anyone who took a distribution from the Plan from 1/1/01 through current date.
   - 30% of the current Core Fund balance will be transferred to the frozen Core Fund for anyone who took a loan from 1/1/01 through current date. For example, if a Member had a 12/31/00 ending Core Fund balance of $10,000 and took a loan in 2001 for $5,000, NYLB will transfer 30% of his $7,000 Core Fund balance (plus earnings) to the frozen Core Fund.

Please review these with the necessary people at Local 12 and sign below to authorize NYLB to proceed upon the above instructions. Please let me know if you have any questions or concerns. I can be reached at (781) 440-2251.

Sincerely,

John Donohue

Al Wassell
Al Wassell

The Asbestos Workers Local 12 Annuity Fund

12/31 Participant Balances	$46,629,504.07 ✓	
Loan Repayments thru 12/31/00	$56,662.10 ✓	
Income 9/1/00-12/31/00	$374,768.00 ✓	
	$47,060,934.17 ✓	
	$44,480,035.83	
	$19,000.00	Payment invested 4/5/01 at NYLB - Removed payment from Partic Acct. Included in 12/31/00 Balance
Additional Wire	$2,561,898.34	
	$47,060,934.17 ✓	

1/1/01 - 6/20/01

	SYG	Core Fund	
Beginning 12/31/00 balances - PARTS	$374,768.00 ✓	$46,686,166.17	✓
New Loans	$0.00	($225,685.70)	✓
Loan Repayments	$0.00	$244,937.37	✓
Withdrawals	$0.00	($97,474.93)	✓
Current PARTS Balance	$374,768.00	$46,607,942.91	
PARTS Balance	$374,768.00	$46,607,942.91	
6/20/01 Trust Balance	$374,768.00	$47,931,470.14	
Difference	$0.00	$1,323,527.23	
Earnings	$0.00	$1,323,527.21	✓
Difference	$0.00	$0.02	rounding
TOTAL EARNINGS	$0.00	$1,323,527.23	

TRUST NEW YORK LIFE COMPANY

The Asbestos Workers Local 12 Annuity Fund

ASSETS HELD FOR INVESTMENT

For Period June 1, 2001 to June 30, 2001

Assets	Cost Basis	Shares	Market Price Per Share	Principal Value	Est. Income Accrual	Market Value
	375,224.15			374,928.11	296.04	375,224.15
	375,224.15			*374,928.11*	*296.04*	*375,224.15*
	12,996,025.86	1,250,863.972	10.7869	13,492,958.34	0.00	13,492,958.34
	918,094.23	918,094.23	1.0000	918,094.23		918,094.23
	13,914,120.09			*14,411,052.57*		*14,411,052.57*
	30,066,684.57	2,893,910.254	10.7869	31,216,352.36	0.00	31,216,352.36
	2,124,037.75	2,124,037.75	1.0000	2,124,037.75		2,124,037.75
	32,190,722.32			*33,340,390.11*		*33,340,390.11*
	12,429.78	418.229	29.7200	12,429.77		12,429.77
	38,350.66	3,261.648	11.7500	38,324.36		38,324.36
	12,429.78	603.680	20.5900	12,429.77		12,429.77
	34,663.61	1,035.043	33.4900	34,663.59		34,663.59
	12,429.78	661.510	18.7900	12,429.77		12,429.77
	52,382.15	1,793.702	29.2000	52,376.10		52,376.10

TRUST NEW YORK LIFE COMPANY

The Asbestos Workers Local 12
Annuity Fund

ASSETS HELD FOR INVESTMENT

For Period June 1, 2001 to June 30, 2001

	Cost Basis	Shares	Market Price Per Share	Principal Value	Est. Income Accrual	Market Value
	44,228.91	901.894	49.0400	44,228.88		44,228.88
						3,821,498.19
Total Assets Held for Investment	*46,686,981.23*	*7,195,581.912*		*48,333,253.03*	*296.04*	*52,155,047.26*

06/29/01

Questions? Call
our Small Business
Telephone Center
1-800-FLEET-BIZ
(1-800-353-3824)

116

ASBESTOS WORKERS
ANNUITY FUND
25-19 43RD AVE
LONG ISLAND CITY NY 11101

CY

5 ENCLOSED ITEMS

CHECKING	BEGINNING BALANCE	DEPOSITS, OTHER CREDITS	WITHDRAWALS, OTHER DEBITS	INTEREST PAID	ACCOUNT ACTIVITY & OTHER FEES	ENDING BALANCE
	2279804.11	700808.30	2592784.07	.00	.00	387828.34

ACCOUNT NO. COMMERCIAL CHECKING -LI PERIOD 06/01/01 THROUGH 06/29/01
SMALL BUSINESS TELEPHONE ACCESS CODE 4446

- DEBITS AND CREDITS -

DATE	DEBITS (-)	CREDITS (+)	DESCRIPTION
06-07		2,046.06	BUSINESS DEPOSIT
06-07		489,577.50	BUSINESS DEPOSIT
06-08		126,996.92	BUSINESS DEPOSIT
06-19	2,561,898.34		WIRE NON-REPETITIVE
			A [illegible]
06-27		82,187.82	NY LIFE BENEFIT SERVICES DEPOSIT

- CHECKS POSTED -

DATE	CHECK NO.	AMOUNT
06-07	1247	10,000.00
06-13	1248	1,007.98

- CHECKS POSTED -

DATE	CHECK NO.	AMOUNT
06-13	1249	941.50
06-13	1250	936.25

- CHECKS POSTED -

DATE	CHECK NO.	AMOUNT
06-29	1252*	18,000.00

* DENOTES SEQUENCE BREAK

- DAILY BALANCE SUMMARY -

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
06-07	2,761,427.67	06-13	2,885,538.86	06-27	405,828.34
06-08	2,888,424.59	06-19	323,640.52	06-29	387,828.34

06/30/01

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ASBESTOS WORKERS
ANNUITY FUND
25-19 43RD AVE
LONG ISLAND CITY NY 11101

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SAVINGS	BEGINNING BALANCE	DEPOSITS, OTHER CREDITS	WITHDRAWALS, OTHER DEBITS	INTEREST PAID	ACCOUNT ACTIVITY & OTHER FEES	ENDING BALANCE
)	322150.54	.00	.00	926.91	.00	323077.45

ACCOUNT NO. SM BUS PLATINUM MM SAVINGS PERIOD 06/01/01 THROUGH 06/30/01
SMALL BUSINESS TELEPHONE ACCESS CODE 8205

ANNUAL YIELD	3.55 %
INTEREST EARNED THIS PERIOD	926.91
2001 INTEREST EARNED YEAR TO DATE	7,178.59

- DEBITS AND CREDITS -

DATE	DEBITS (-)	CREDITS (+)	DESCRIPTION
06-29		926.91	INTEREST CREDITED PERIOD 06-01-01 TO 06-30-01

- DAILY BALANCE SUMMARY -

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
06-29	323,077.45				
06-01	3.690	06-15	3.590	06-29	3.440
	3.590		3.440		3.300

The Asbestos Workers Local 12
Annuity Fund

ASSETS HELD FOR INVESTMENT

For Period November 10, 2000 to December 31, 2000

Assets	Cost Basis	Shares	Market Price Per Share	Principal Value	Investment Income	Market Value
	43,062,710.42	4,144,774.226	10.4749	43,416,145.28	0.00	43,416,145.28
	1,063,890.55	1,063,890.55	1.0000	1,063,890.55		1,063,890.55
	44,126,600.97			*44,480,035.83*		*44,480,035.83*
						3,807,621.70
Total Assets Held for Investment	*44,126,600.97*	*5,208,664.776*		*44,480,035.83*	*0.00*	*48,287,657.53*

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NEW YORK, N.Y 10163

0 05517AR5/04

As Of 12-31-00
Account No

ASBESTOS WORKERS ANNUITY FUND
25 19 43RD AVE
LIC NY 11101

HERE IS YOUR MONEY MANAGEMENT ACCOUNT FROM DEC 01,2000 THRU DEC 31,2000

		Account Number	Beginning Balance	Changes	Ending Balance
YOUR MONEY IN THE BANK	NOT FOR PROFIT NOW		67,014.85	42.58	67,057.43
	Total		67,014.85	42.58	67,057.43

SECURITIES (NOT FDIC INSURED)

BORROWING & LOANS

AT CITIBANK, YOU'LL FIND SMALL-BUSINESS EXPERTS WHO CAN SHOW YOU HOW TO USE CREDIT BETTER AND MANAGE MONEY SMARTER SO YOUR BUSINESS GROWS FASTER. TO TALK TO A BUSINESS BANKING SPECIALIST, CALL 1-800-328-CITI, EXT. 2400 OR VISIT YOUR CITIBANK BRANCH. FOR CUSTOMER SERVICE CALL 627-3999 FROM ANY AREA CODE IN THE TRI-STATE AREA.

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NOW, WHEN YOU GET THE CITIBUSINESS CARD, YOUR YEAR-END BONUS IS GUARANTEED. IF YOU APPLY AND BECOME A CARDMEMBER IN GOOD STANDING BY 2/28/01, YOU WILL BE INCLUDED IN THE CITIBUSINESS CARD SMALL BUSINESS YEAR-END BONUS PROGRAM. YOU'LL RECEIVE A BONUS VALUE BOOK OF OFFERS & SAVINGS SPECIALLY TAILORED TO YOUR SMALL BUSINESS NEEDS - ABOVE AND BEYOND THE GREAT DISCOUNTS THAT ARE ALREADY PART OF THE CARD.

WHEN YOU BECOME A CITIBUSINESS CARDMEMBER, YOU CAN CONSIDER YOURSELF PART OF A STRONG SMALL BUSINESS NETWORK. SO CALL NOW AT 1-800-893-3697 TO APPLY FOR YOUR CARD TODAY!

YOUR MONEY IN THE BANK ACTIVITY FROM DEC 01,2000 THRU DEC 31,2000

NOT FOR PROFIT NOW

BEGINNING BALANCE AS OF: DEC 01,2000 $67,014.85

Account Activity

Date	Description	Debits	Credits	Balances
Dec 29	INTEREST EARNED		42.58	67,057.43
ENDING BALANCE AS OF: DEC 31,2000			42.58	$67,057.43

Interest Year To Date $861.36

63

12/29/00

Questions?
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Banking Center at
1-800-PARTNER

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ASBESTOS WORKERS
ANNUITY FUND
25-19 43RD AVE
LONG ISLAND CITY NY 11101

CY

13 ENCLOSED ITEMS

CHECKING	BEGINNING BALANCE	DEPOSITS, OTHER CREDITS	WITHDRAWALS, OTHER DEBITS	INTEREST PAID	ACCOUNT ACTIVITY & OTHER FEES	ENDING BALANCE
	1064709.16	118817.78	63057.01	.00	.00	1120469.93

ACCOUNT NO. 9427-741968 COMMERCIAL CHECKING -LI PERIOD 12/01/00 THROUGH 12/29/00
BUSINESS BANKING CENTER ACCESS CODE

- DEBITS AND CREDITS -

DATE	DEBITS (-)	CREDITS (+)	DESCRIPTION
12-06		20,646.62	BUSINESS DEPOSIT
12-06		98,159.40	BUSINESS DEPOSIT
12-20		11.76	BUSINESS DEPOSIT

- CHECKS POSTED -

DATE	CHECK NO.	AMOUNT	DATE	CHECK NO.	AMOUNT	DATE	CHECK NO.	AMOUNT
12-20	1204	38,143.70	12-14	1210	680.84	12-13	1214	3,800.00
12-12	1206*	2,500.00	12-22	1211	4,625.01	12-12	1215	500.00
12-13	1207	1,300.00	12-12	1212	800.00	12-22	1216	322.92
12-13	1208	323.44	12-22	1213	2,953.92	12-19	1217	6,493.75
12-14	1209	613.43						

* DENOTES SEQUENCE BREAK

- DAILY BALANCE SUMMARY -

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
12-06	1,183,515.18	12-14	1,172,997.47	12-20	1,128,371.78
12-12	1,179,715.18	12-19	1,166,503.72	12-22	1,120,469.93
12-13	1,174,291.74				

12/31/00

Questions?
Call our Business
Banking Center at
1-800-PARTNER

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ASBESTOS WORKERS
ANNUITY FUND
25-19 43RD AVE
LONG ISLAND CITY NY 11101

CY

SAVINGS	BEGINNING BALANCE	DEPOSITS, OTHER CREDITS	WITHDRAWALS, OTHER DEBITS	INTEREST PAID	ACCOUNT ACTIVITY & OTHER FEES	ENDING BALANCE
	314339.74	.00	.00	1559.12	.00	315898.86

ACCOUNT NO. PLATINUM BUS MNY MKT SAV PERIOD 12/01/00 THROUGH 12/31/00
BUSINESS BANKING CENTER ACCESS CODE
ANNUAL YIELD 5.99 %
INTEREST EARNED THIS PERIOD 1,559.12
2000 INTEREST EARNED YEAR TO DATE 15,898.86

- DEBITS AND CREDITS -

DATE	DEBITS (-)	CREDITS (+)	DESCRIPTION
12-29		1,559.12	INTEREST CREDITED PERIOD 12-01-00 TO 12-31-00

- DAILY BALANCE SUMMARY -

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
-29	315,898.86				
-31	5.840				
	5.840				

2-26

Report of Interview

U.S. Department of Labor
Employee Benefits Security Administration

A phone interview of Mr. was held on December 3, 2008at the Employee Benefits Security Administration office by Investigator Jose Castillo.

Mr. provided the following information:

He stated that according to the former plan administrator the yearly allocation was done after consultation with Reynolds Securities which is the investment advisor of the Fund then and now.

He stated that when the Fund did not performed well, Reynolds always provide information.

He stated that the minutes of the trustees meeting will show the statements from Reynolds how the Fund was performing.

He stated that there is a big difference of the Allocable Net Asset used by Heinzman on the special project Interest Allocation Analysis dated 9/28/2001 compared to the ones stated on the financial statements (which is stated as Net Assets Available for Benefits).

He stated that it's on page 5 of the special project and he is just concern by now only the 1994, 1996 and 1998 years.

He stated that because of these figures used on the special project, his account balances in 1994, 1996 and 1998 received negative adjustments.

He stated that his other concern is that why on page 6 of this special project on the 1999 column, the Loans receivables amount of $2,513,749 is being deducted from the Net Assets available for benefits.

And also, the 2000, $2,756,494 is being deducted from the $49,497,552 Net Assets Available for Benefits.

He stated that the plan document of the Fund does not state that to figure out the Net assets, Loans Receivables must be deducted.

76 72

He further stated that his SAR(summary annual reports) from 1999 to at least 1990 were mailed to EBSA sometimes in 2006 or 2007.

By: Jose Castillo, Investigator
At: New York Regional Office
EBSA

Date Prepared: Dec. 9, 2008
Case NO. 30-099939 (48)

Report of Interview

U.S. Department of Labor
Employee Benefits Security Administration

A phone interview of Mr. was held on December 3, 2008at the Employee Benefits Security Administration office by Investigator Jose Castillo.

Mr. provided the following information:

He stated that according to the former plan administrator the yearly allocation was done after consultation with Reynolds Securities which is the investment advisor of the Fund then and now.

He stated that there is a big difference of the Allocable Net Asset used by Heinzman on the special project Interest Allocation Analysis dated 9/28/2001 compared to the ones stated on the financial statements (which is stated as Net Assets Available for Benefits).

He stated that page 5 of the special project is disturbing and he is as of the moment concern about the 1994, 1996 and 1998 years.

He stated that the figures used by Heinzman are not the same as what the financial statement show. He further stated that because Heinzman used "figures from nowhere", their account balances were screwed. Lannigan asked me if I have the financial statements for these years.

He stated that based on what he discovered that the figures used by Heinzman for 1994, 1996 and 1998 Interest Allocation Analysis look fraudulent, there were no misallocations occurred.

He further added that the settlement payment paid by the insurance was based on the misallocations, since it seems that there were no misallocations, there was insurance fraud here.

He further stated that EBSA should look into this misallocation claim and consider it an insurance claim fraud.

He stated that his other concern is that why on page 6 of this special project on the 1999 column, the Loans receivables amount of $2,513,749 is being deducted from the Net Assets available for benefits.

And also, the year 2000, why the $2,756,494 loan receivables is being deducted from the $49,497,552 Net Assets Available for Benefits.

He stated that the plan document of the Fund does not state that to figure out the Net assets, Loans Receivables must be deducted.

He further stated that he has more questions about this special project and will communicate it to the Investigator as soon as he can able to figure out the questions.

He also stated that this investigator (Castillo) still have not provided the telephone number of the supervisor of Ms. Garcia who claimed to be an OIG Investigator that called him.

He stated that this Ms. Garcia has no business calling him and asking him if he had spoken to the FBI concerning his claim that the EBSA investigation of Local 12 Funds is corrupted.

He stated that if Ms. Garcia wants to know what's going on, she should call the Regional Director Kay not him.

**Note: Mr. asked me for the name and phone number of Ms. Garcia's supervisor. I did not respond to the query.

**Note: The Regional Director, Jonathan Kay, informed this Investigator in the morning of December 5, 2008 that Mr. called and told him that the information in question is being reviewed by 's son in law who is a CPA.

By: Jose Castillo, Investigator Date Prepared: Dec. 9, 2008
At: New York Regional Office Case NO. 30-099939 (48)
EBSA

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Mr. provided the following information:

He stated that according to the former plan administrator the yearly allocation was done after consultation with Reynolds Securities which is the investment advisor of the Fund then and now.

He stated that when the Fund did not performed well, Reynolds always provide information.

He stated that the minutes of the trustees meeting will show the statements from Reynolds how the Fund was performing.

He stated that there is a big difference of the Allocable Net Asset used by Heinzman on the special project Interest Allocation Analysis dated 9/28/2001 compared to the ones stated on the financial statements (which is stated as Net Assets Available for Benefits).

He stated that it's on page 5 of the special project and he is just concern by now only the 1994, 1996 and 1998 years.

He stated that because of these figures used on the special project, his account balances in 1994, 1996 and 1998 received negative adjustments.

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He stated that this Ms. Garcia has no business calling him and asking him if he had spoken to the FBI concerning his claim that the EBSA investigation of Local 12 Funds is corrupted.

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**Note: asked me for the name and phone number of Ms. Garcia's supervisor. I did not respond to the query.

**Note: The Regional Director, Jonathan Kay, informed this Investigator in the morning of December 5, 2008 that Mr. called and told him that the information in question is being reviewed by 's son in law who is a CPA.

By: Jose Castillo, Investigator Date Prepared: Dec. 9, 2008
At: New York Regional Office Case NO. 30-099939 (48)
EBSA

2-27

Memo to File

Case No. 30-099939(48)
Local 12 Annuity Fund

From: Jose Castillo
Investigator

~~In~~ the late afternoon of **December 4, 2008** Jonathan Kay, the regional director, Bob Goldberg, the special supervisor and I had a meeting concerning Local 12 Annuity Fund.

At the beginning we discussed and reviewed again the documents submitted by trustees' counsels to address Issue no. 3 of my Report of Investigation, part II (used of plan assets to augment employer contributions for a total amount of $421,000.).

All three of us review these same documents about a week and a half ago and concluded that it does not satisfy EBSA's request for documentation to prove that the amount of money transmitted by the fund office as employer contributions to the financial custodian is equals what the employers controlled by trustees transmitted to the fund office.

We reviewed it again. This time Kay made a forceful statement saying that the documents matched, meaning it satisfy as proof. I smiled and stated to Kay, "You sound like a defense counsel".

He became enraged and pointed his finger on me. I told him don't point that finger on me

Then we started discussing the 6/19/2001 letter from New York Life, the financial custodian of the Fund. Page two of the letter shows the reconciled statements showing account balances as of 6/20/2001.

He pointed out to me that as of 6/20/2001, participants account balance is **$46,607,942.91**

Then he pointed out that on the same date, trust account balance (plan asset with NYL) is **$47,931,470.14.**

The difference between the two is $1,323,527.23 which represents the investment earning from January 1, 2001 until June 20, 2001.

Then he forcefully stated that the participants account balance as of 6/20/2001 must be $47,931,470.14 then because the participants are entitled to the $1,323,527.23.

I told him that the participants account balance as of 6/20/2001 is $46,607,942.91 as shown. The account balance will only change if the earning of $1,323,527.23 is allocated. However, before this is allocated, the account balance remains at $46,607,942.91.

We discussed this scenario for over more than three times until we changed the subject. All the time, he is insisting that the participants account balance should be $47,931,470.14 as of 6/20/2001.

The main goal here of Jonathan Kay is to reflect that participants account balance is **$47,931,470.14 instead of $46,607.942.91. That way, the trustees counsel alibi that on this date, participants account balance is more than the Fund's total assets and the $381,099.00 investment earning for 2000 was needed so that there will be enough asset to cover for the participants account balance.

Loan Receivables issue:

We looked at the financial statement of the Annuity Fund as of 12/31/2000. The following data applies:

Interest bearing cash	1,630,374.
U.S. Government Securities	29,588,966.
Corporate debt instruments	4,686,172.
Preferred stock	120,000.
Real Estate investment trusts	194,351
Mutual Funds	8,238,570.
Participants Loan Receivables	2,756,494
Total	**47,214,927.**

He stated that the Participants Loan Receivables of $2,756,494. is not an asset of the Fund.

He stated that the Fund's asset should be $47,214,927 minus $2,756,494 equals $44,458,433.

He stated that the $2,756,494 Loan Receivables is not an asset because if this Fund is totally owned by one person and this person wants to take all her or his money out, there would be not enough assets for cash conversion to pay this person.

We discussed this scenario numerous times until we decided to quit. I suggested to him that we set down with a CPA to resolve the issue.

Again, the goal of Jonathan Kay here is to show that as of 12/31/2000, the Annuity Fund has less assets compared to the total participants account balance of **$46,686,166.00. That way, the alibi of the trustees counsels not to allocate the earnings for 2000 because assets was less than the participants account balance **will fly.**

*His example scenario of only one person owns the fund is NOT POSSIBLE because any fund that is only owned by a single person *is not an ERISA Fund.*

**And, even so, if this person takes all the assets out, only $44,458.433 will be distributed because the $2,756,494 was already borrowed (by this person). Instead of getting the cash of $2,756,494, this person will receive an IRS Form 1099D (distributions).*

**This is not the first time Jonathan Kay used this own by one person scenario. In November 2007, before he signed my ROI, Part II, he strongly made this argument to me.*

***Before we decided to go home, he tried to make a deal with me by saying that, "if a CPA will make a determination that Loan Receivable is not a plan asset, will you agree?"*

I said I don't thing so.

***Also, he stated that it is "only according to me and not according to New York Life that the Fund went "live" because the participants account balances were provided in June 2001."*

Remember: The trustees' newest alibi is that $381,099 was needed to be used as employer contribution in order for the Fund to go "live".

On January 2008 meeting with Ms. Weekley and Golberg, the theory that Loan Receivables can be considered NOT A PLAN ASSET was discussed. See email dated 1/25/2008 at 4:51 PM.

2-28

U.S. Department of Labor

Employee Benefits Security Administration
33 Whitehall St., Suite 1200
New York, NY 10004
Phone: (212) 607-8600
Telefax: (212) 607-8681

December 8, 2008

To: Scott Albert
OCA

From: Jonathan Kay JK
NYRO Regional Director

Re: Local Union 12 Asbestos Workers Annuity and Welfare Funds
EBSA Case Nos.: 30-099939(48) and 30-099940(48)

Attached is a description and relevant documents describing one of the two issues that will be discussed at our upcoming meeting. A description of the second issue and pertinent documents will be sent to you tomorrow. Please familiarize yourself with these documents. I would like to conduct a telephone conference on Thursday morning (12/11) so that we can review these issues with you prior to your trip to the NYRO.

By way of background, in or about 2000 the Annuity Fund trustees decided that they would convert to a self-directed plan which would allow participants to self-direct their own investments. This conversion took place on June 20, 2001. The Annuity Fund selected New York Life as the custodian of the Annuity Funds assets which exceeded 45 million dollars.

Immediately prior to the conversion to a self-directed plan, the Annuity Fund contends that it discovered that 1) Fund Administrator, Jerome Market, may have diverted money from the Fund and 2) throughout the 1990s earnings on the Annuity Fund's investments may have been improperly allocated to individual participants accounts. According to the Annuity Fund's trustees, the improper allocations resulted in over- or understatement of participants' accounts. The situation was aggravated by the fact that some participants whose accounts were overstated received distributions during the 1990s and excessive benefit payments were not recouped from these individuals. Again, according to the trustees, the diversions and mismanagement resulted in a $1.9 million reduction in plan assets. Ultimately, the trustees say that at the time the Plan became self-directed in June 2001, the $1.9 million reduction caused the Annuity Fund to have less in assets than the aggregate amount of all the participants' account balances.

At the same time the Trustees were sorting out the account balances, with the help of the Schulteis and Panettieri accounting firm, the Annuity Fund's trustees had to decide how to allocate the Annuity Fund's investment earnings for 2000 which are reported as $1.8 million. According to the trustees, the shortfall between assets on hand and participants' account balances was made up by the $1.8 million in 2000 earnings which enabled the Annuity Fund to "go live" with the self-directed accounts at New York Life in June 2001.

In 2002 the trustees filed suit against former Fund manger Jerome Market and others to recover the losses caused by the above diversions and mismanagement that resulted in the $1.9 million reduction. In 2004 the lawsuit was settled and resulted in separate payments by fidelity and fiduciary carriers as well as defendants that totaled approximately $1.3 million. Upon receipt of these funds the trustees cliam that the 2000 earnings could, and were, finally allocated to individual participant accounts, up to the $1.3 million recovery.

The NYRO questions whether the $1.8 million in earnings for 2000 were 1) ever allocated and 2) whether they were necessary to make up the $1.9 million alleged "shortfall" between participant accounts and plan assets. Central to this determination is whether the full amount of "net assets available for benefits" should be counted as available to fund the participants' aggregate account balances. One component of the net assets available for benefits is some $2.756 million in participant loans receivables.

The following relevant documents are attached:

1) Excerpt from Fund's Statement of Net Assets Available for benefits for 12/31/99 and 12/31/00 (1 page);

2) Notes to fund's financial statements for year ended 12/31/00 (1 page);

3) Excerpt from AICPA Employee Benefit Plans Audit Guide (3 pages);

4) NY Life statement of Annuity Fund's Assets Held for Investment as of 6/30/01 (2 pages);

5) June 19, 2001 letter from NY Life to Annuity Fund Manager Al Wassell (1 page);

6) Reconciliation of participant account balances as of 12/31/00 and 6/19/01 as well as assets at NY Life as of the same dates (1 page);

7) Schedule prepared by the Annuity Fund showing participant [redacted]'s actual earnings during 1993 and 2000 as calculated by Shulteis and Panettieri in 2001 and as originally calculated by the Annuity Fund (1page).

I appreciate your help in resolving this matter.

THE ASBESTOS WORKERS LOCAL 12 ANNUITY FUND

STATEMENTS OF NET ASSETS AVAILABLE FOR BENEFITS

DECEMBER 31, 2000 AND 1999

	2000	1999*
Assets		
Investments, at fair value		
Interest bearing cash	$ 1,630,374	$ 1,891,057
U.S. government securities	29,588,966	18,865,493
Corporate debt instruments	4,686,172	12,625,061
Preferred stock	120,000	111,250
Collective trust funds	-	11,595,238
Real estate investment trusts	194,351	169,891
Mutual funds	8,238,570	2,578,590
Participants' loans	2,756,494	2,513,749
Total investments	47,214,927	50,350,329
Receivables		
Employers' contributions	718,529	378,419
Accrued interest	439,965	416,116
Due from related organizations	209,425	89,840
Cash	1,112,175	113,387
Other assets	13,075	-
Total assets	49,708,096	51,348,091
Liabilities		
Accounts payable for administrative expenses	206,631	43,596
Due to related organizations	3,913	-
Total liabilities	210,544	43,596
Net assets available for benefits	$ 49,497,552	$ 51,304,495

*Restated and reclassified to conform with 2000 presentation.

See notes to financial statements.

#1

THE ASBESTOS WORKERS LOCAL 12 ANNUITY FUND

NOTES TO FINANCIAL STATEMENTS

YEAR ENDED DECEMBER 31, 2000

8. Interest distribution to members:

The Plan distributes to the participants' accounts the approximate net earnings of the Plan at the end of each year. No earnings were allocated for the year ended December 31, 2000.

9. Participants' accounts reconciled to net assets available for benefits as of December 31, 2000 are as follows:

Participants' fixed income accounts	$ 46,686,166
Participant loans receivable	2,756,494
Unallocated assets	54,892
Net assets available for benefits December 31, 2000	$ 49,497,552

As of December 31, the Plan met the minimum funding requirements.

10. Pension plans:

The Plan contributes to three pension plans on behalf of all employee groups. Contributions are generally at fixed hourly rates per employee, or a percentage of salary. Contributions for the year ended December 31, 2000 are as follows:

Plan	
Asbestos Workers Local 12 Annuity Fund	$ 6,912
Asbestos Workers Local 12 Pension Fund	7,884
Heat and Frost Insulators International Pension Fund	3,032
Total	$ 17,828

#2

AICPA Audit and Accounting Guide

EMPLOYEE BENEFIT PLANS

With Conforming Changes as of March 1, 2006

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

AICPA

#3

benefit formula of a cash balance plan or a pension equity plan is different from that of a traditional defined benefit pension plan, the audit procedures to be performed on the benefit obligation information would be the same as those for a traditional defined benefit pension plan. In addition, since the hypothetical account for each participant is generally credited with a compensation and earnings credits each year, the auditor should consider applying auditing procedures that include—

a. Testing the interest rate used in the current year's interest credit to ensure that it complies with the provision of the plan.

b. Testing a sample of participants' earnings and appropriate factor used for the compensation credit to ensure that it complies with the provisions of the plan.

Defined Contribution Plans

10.14 For defined contribution plans, the types of participant data that should be tested will vary from plan to plan. The data tested generally should include—

a. Covered compensation of individual participants (for example, definition of compensation per plan document which may include bonuses or other compensation). Misinterpreting the definition of compensation is one of the most common operational errors for defined contribution plans. *Note:* IRS regulations generally require that the non-matching company contribution be allocated to participants on the basis of the ratio of their covered compensation to total covered compensation for all participants.

b. Individual participants' contributions to the plan.

c. Birth date, date of hire, and other demographic data that determine eligibility and vesting.

10.15 In addition to other uses, these data are used by the auditor to test the validity of terminations and the eligibility of individuals to participate in the plan. Examples of the auditor's procedures in which the data are used are—

a. Tracing individuals who have terminated to benefit payments and, if forfeitures are involved, to the record of forfeited amounts.

b. For individuals who qualify for participation during the year and who elect to participate, evaluating whether the individuals have been properly included in the individual participant accounts.

c. For individuals who qualify for a loan from the plan, determine that the loan is made in accordance with the plan's loan policy and has been properly segregated in the individual's account. (See paragraph 7.55 for participant loan auditing procedures.)

10.16 The auditing procedures discussed in paragraphs 10.04 through 10.06 (including procedures relating to the use of the work of an actuary, if applicable) should also be applied to the data.

Defined Contribution Plans—Allocation Testing

10.17 The net assets available for benefits for defined contribution plans are normally allocated to individual participant accounts according to procedures set forth in the plan instrument or in a collective bargaining agreement.

#3 cont'd

In some cases the plan instrument may even specify the allocation of individual plan assets.

10.18 Plan assets of defined contribution pension plans are generally to be presented at their fair value (see paragraphs 3.13 and 3.17 for special provisions concerning the valuation of insurance contracts and the valuation of fully benefit-responsive-contracts). Such plans typically permit periodic contributions, withdrawals, loans and changes in investment elections. Transactions can be executed by the plan participant at varying frequencies depending upon the plan's provisions; however, plans that permit transactions on a daily basis are becoming more common. Thus, the determination of the value of plan assets on the dates throughout the year in which the plan permits transactions is important. Where an investment option in a defined contribution plan contains "hard to price" investments such as limited partnerships, periodic valuation is more difficult, but nonetheless important. Failure to properly value plan assets on the date of a participant directed transaction can result in such transactions being executed at inappropriate amounts and consequently either an understatement or overstatement of plan assets and distributions.

10.19 The objective of auditing procedures applied to individual participant accounts of defined contribution plans is to provide the auditor with a reasonable basis for concluding—

a. Whether net assets have been allocated to the individual participant accounts in accordance with the plan instrument.[2]

b. Whether the sum of the participant accounts reconciles with the total net assets available for plan benefits.

c. Whether participant transactions are authorized and have been executed at the proper amount in the proper period.

10.20 Procedures that the auditor ordinarily should apply to individual participant accounts (rather than at the plan level) include—

a. Obtaining an understanding of how allocations are to be made. This may include reviewing pertinent sections of the plan instrument or collective bargaining agreement and discussion with plan administrator.

b. Testing the allocation of income or loss, appreciation or depreciation in value of investments, administrative expenses, and amounts forfeited for selected accounts. The testing of internal controls over this area may be addressed in the SAS No. 70 report of the recordkeeper for the plan's investment. To reduce the amount of substantive testing, consider relying on a SAS No. 70 report, if available (the SAS No. 70 report must cover those areas).

c. Testing the allocation of the employer's contribution. (The testing of internal controls over this area may be addressed in the SAS No. 70 report of the recordkeeper for the plan's investment.)

d. For plans with participant contributions, determining whether individual contributions are being credited to the proper participant accounts and to the investment medium selected by the participant, if applicable. Where participants make contribution or investment

[2] The effects of misallocation of assets should be considered in relation to the financial statements as a whole rather than in relation to individual accounts.

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No. 70 report

e. Determining
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f. Testing of a n
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Depending on the existing
the results of other auditin
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Health and Welfare Be

10.21 The types of pa
the financial statements of
plan to plan. In general, th

a. Payroll data, in

b. Demographic da
ber of dependen

c. Claims history r

10.22 The auditing pr
10.06 (including procedures
applicable) should also be ap
eligibility and benefits is dis

Plan Obligations

10.23 As discussed earli
nature of plan benefit obliga
those obligations differ signif

Defined Benefit Plans

10.24 The objective of a
benefits is to provide the audit
the actuarial present value of
benefits, and amounts of cha
lated plan benefits are presen
Accounting and Reporting by
ordinarily accomplished by ap
graph 9.03 for benefit payme
pant data, and paragraphs 10.

10.25 The actuarial valu
fits in accordance with FASB S

TRUST NEW YORK LIFE COMPANY

The Asbestos Workers Local 12
Annuity Fund

ASSETS HELD FOR INVESTMENT — For Period June 1, 2001 to June 30, 2001

Assets	Cost Basis	Shares	Market Price Per Share	Principal Value	Est. Income Accrual	Market Value
	375,224.15			374,928.11	296.04	375,224.15
	375,224.15			*374,928.11*	*296.04*	*375,224.15*
	12,996,025.86	1,250,863.972	10.7869	13,492,958.34	0.00	13,492,958.34
	918,094.23	918,094.23	1.0000	918,094.23		918,094.23
	13,914,120.09			*14,411,052.57*		*14,411,052.57*
	30,066,684.57	2,893,910.254	10.7869	31,216,352.36	0.00	31,216,352.36
	2,124,037.75	2,124,037.75	1.0000	2,124,037.75		2,124,037.75
	32,190,722.32			*33,340,390.11*		*33,340,390.11*
	12,429.78	418.229	29.7200	12,429.77		12,429.77
	38,350.66	3,261.648	11.7500	38,324.36		38,324.36
	12,429.78	603.680	20.5900	12,429.77		12,429.77
	34,663.61	1,035.043	33.4900	34,663.59		34,663.59
	12,429.78	661.510	18.7900	12,429.77		12,429.77
	52,382.15	1,793.702	29.2000	52,376.10		52,376.10

TRUST NEW YORK LIFE COMPANY

The Asbestos Workers Local 12
Annuity Fund

ASSETS HELD FOR INVESTMENT

For Period June 1, 2001 to June 30, 2001

	Cost Basis	Shares	Market Price Per Share	Principal Value	Est. Income Accrual	Market Value
	44,228.91	901.894	49.0400	44,228.88		44,228.88
						3,821,498.19
Total Assets Held for Investment	*46,686,981.23*	*7,195,581.912*		*48,333,253.03*	*296.04*	*52,155,047.26*

BENEFIT SERVICES

June 19, 2001

PRIVATE & CONFIDENTIAL

Mr. Al Wassell, Jr.
Asbestos Workers Local 12
25-19 43rd Avenue
Long Island City, NY 11101

Re: The Asbestos Workers Local 12 Annuity Fund

Dear Al:

I am writing this letter to explain how each Members account will be split based on the 70-30% allocation.

1. The earnings from 9/1/00–12/31/00 of $374,768 will be placed in a Suspense Account invested in the Stable Value Option. The money will remain in that account until NYLB receives a file from Local 12 instructing NYLB how to allocate it to the Members. NYLB will not allocate any earnings to this account for the period of 1/1/01 through current date. However, interest will accrue in this account going forward.

2. NYLB will allocate earnings from the Local 12 Core Fund to Member accounts for the period of 1/1/01 through current date on a pro-rata basis.

3. 30% of each Members current Core Fund balance will be transferred from the Self-directed Core Fund to the frozen Core Fund. Please note the following:
   - 100% of the current Core Fund balance will be transferred to the frozen Core Fund for anyone who took a distribution from the Plan from 1/1/01 through current date.
   - 30% of the current Core Fund balance will be transferred to the frozen Core Fund for anyone who took a loan from 1/1/01 through current date. For example, if a Member had a 12/31/00 ending Core Fund balance of $10,000 and took a loan in 2001 for $5,000, NYLB will transfer 30% of his $7,000 Core Fund balance (plus earnings) to the frozen Core Fund.

Please review these with the necessary people at Local 12 and sign below to authorize NYLB to proceed upon the above instructions. Please let me know if you have any questions or concerns. I can be reached at (781) 440-2251.

Sincerely,

John Donohue

Al Wassell
Al Wassell

#5

9 #

The Asbestos Workers Local 12 Annuity Fund

12/31 Participant Balances	$46,629,504.07 ✓
Loan Repayments thru 12/31/00	$56,662.10 ✓
Income 9/1/00-12/31/00	$374,768.00 ✓
	$47,060,934.17 ✓

	$44,480,035.83	
	$19,000.00	Payment invested 4/5/01 at NYLB - Removed payment from Partic Acct. Included in 12/31/00 Balance
Additional Wire	$2,561,898.34	
	$47,060,934.17 ✓	

1/1/01 - 6/20/01

	SVO	Core Fund	
Beginning 12/31/00 balances - PARTS	$374,768.00 ✓	$46,686,166.17	✓
New Loans	$0.00	($225,685.70)	✓
Loan Repayments	$0.00	$244,837.37	✓
Withdrawals	$0.00	($97,474.93)	✓
Current PARTS Balance	$374,768.00	$46,607,942.91	
PARTS Balance	$374,768.00	$46,607,942.91	
6/20/01 Trust Balance	$374,768.00	$47,931,470.14	
Difference	$0.00	$1,323,527.23	
Earnings	$0.00	$1,323,527.21	✓
Difference	$0.00	$0.02	rounding
TOTAL EARNINGS	$0.00	$1,323,527.23	

NYBL paperwork

EOY Acct Balance

Year	Actual Earnings		Original Earnings Allocation		Account Adjustment	
	Rate	Earnings	Rate	Earnings	%	$
1/1/1993	-	170,050.08	-	165,597.92	-	4,452.16
1993	7.88%	14,799.35	8.73%	14,435.10	-0.85%	364.25
1994	-3.81%	(8,051.78)	2.38%	4,512.49	-6.19%	(12,564.27)
1995	15.56%	35,415.43	12.20%	25,271.37	3.36%	10,144.06
1996	2.02%	5,765.46	12.90%	31,591.44	-10.88%	(25,825.98)
1997	8.18%	24,275.04	7.70%	22,015.50	0.48%	2,259.54
1998	8.30%	27,785.81	10.10%	32,199.66	-1.80%	(4,413.85)
1999	-0.63%	(2,245.89)	-3.00%	(10,920.52)	2.37%	8,674.63
2000	3.84%	18,282.05	0.00%	-	3.84%	18,282.05

Total Reallocation Adjustments	$1,372.59
Allocation of Fidelity/Theft Proceeds	2,819.07
Allocation of Refunded Administrative Fees	1,681.82
Reimbursed Distribution From Insurance Provider	-
Net Addition/(Deduction) to Individual's Account Balance	5,873.48

not an adjustment made by applicant

ENCL #1

MEMO TO FILE

December 15, 2008

Local 12 Asbestos Workers Annuity Fund
Case No. 30-099939 (48)

Memorandum From: Jose Castillo
Investigator
EBSA, NYRO

Subject: Meeting with Scott Albert of the Office of the Chief Accountant (OCA), EBSA, National Office, Washington DC

Present were: Robert Goldberg, "Special Supervisor" Assigned to Investigator Castillo for Local 12 Funds cases Only, Jonathan Kay, Regional Director, Jennifer Weekley & Dennis Kade, Solicitor of Labor Trial Attorneys

On the above date, the above mentioned personnel discussed with Mr. Scott Albert the issue of whether Participants Loan Receivables is considered plan assets. This meeting was held to address the Regional Director's theory that Participants Loan Receivables may not be considered plan assets.

On his memo dated December 8, 2008 to Mr. Albert, the Regional Director stated " Central to this determination is whether the full amount of "net assets available for benefits" should be counted as available to fund the participants' aggregate account balances. One component of the net assets available for benefits is some $2,756 million in participant loan receivables".

The investigation of this case was conducted and a Report of Investigation was issued and referred to the Solicitor of Labor for possible litigation. The main issue on the case is that the investment earnings for 2000 was not credited to the participants' account balances because the trustees decided not to allocate the " net assets available for benefits" of $49,497,552 as required by the plan document and by the AICPA Audit and Accounting Guide for Employee Benefit Plans.

On the trustees' letter dated September 29, 2006, they contended that the allocation was not done because as of December 31, 1999, it was discovered that there is a shortfall in Fund assets (i.e. a difference between the assets on hand as of December 31, 1999 and the amounts reflected by adding up all of the Individual Accounts) in the amount of approximately $1,900,309).

The trustees contented that the shortfall was discovered as a result of the special project performed by Schultheis & Panettieri completed **September 28, 2001.**

However, the Report of Investigation, Part II conducted by this Investigator shows otherwise. The financial audit for 2000 completed **August 2, 2001** by the same auditors (Schultheis & Panettieri) headed by James Heinzman that performed the special project discovered no shortfall. The financial statements prepared show the net assets available for benefits is **$49,497,552** and the total aggregate participants account balances is **$46,686,166.00.** The subsequent financial statements filed with Form 5500s from 2001 to 2005 showed no shortfall and the $49,497,552 net assts available for benefits amount was carried forward as the beginning assets for the 2001 financial statements.

This investigator pointed out that the defense of the trustees appeared to have evolved from the beginning as "a shortfall in plan assets "to "plan assets minus loan receivables as the correct plan assets total" and the *$381,099 was needed to used as employer contribution to permit the Fund to go "live" or self-directed. This changing defense alibi is apparent on the July 31, 2008 discussion between trustees' counsels and James Heinzman on one side and special supervisor Robert Goldberg and Jennifer Weekley of the SOL on the government side. **Due to management decision, this Investigator was not allowed to be in this "discussion."**

* The $381,099 issue which is issue no. 1 became included in the discussion of Issue no. 2. Mr. Albert concluded that the two issues are actually the same and one. This investigator agreed and nobody in the room appeared to disagree. This investigator point out that at the beginning the defense was that this money was used because the Fund used employer contributions money to pay for accrued administrative expenses. Since they cannot provide documentation for these accrued administrative expenses, it quickly changed it, to this money is needed because if it was allocated, the Fund would become under funded and needed so the Fund can go "live".

On this discussion, the exact wordings are as follows:

"Goldberg asked Heinzman: when one looks at the 2000 financial statements it appears that the Fund had more assets than what the participant account had listed. Heinzman indicated that that is not correct. Whatever cash the Fund had was listed in the financial statements, however, the assets listed in the financial statements included non-available cash like loans receivable and other non-cash items like other receivables and payables. Heinzman stated that if you subtracted the receivables (including loans) and payables, the available cash was lower than participant account balances".

This investigator point out to Mr. Albert that in this discussion, Heinzman is describing cash and assets as the same and one. I point out to Mr. Albert that the Fund had only $1,630,374 Interest bearing cash invested while total invested assets is $47,214,927.00 which is mostly in securities and the $2,756,494 Participants Loan Receivables and the $8,238,570 in mutual funds.

This investigator point out to Mr. Albert that the Fund was able to go "live" in June 2001 because the participants account balance was finally provided to New York Life, the financial custodian and record keeper of the Fund and not because it needed the $381,099 to be used as employer contributions. I presented the memo to file interview I conducted with New York Life back in June 22, 2006 that shows that in June 2001 participants account balance was provided in order for the Fund to go live. The memo also shows that the total of the two items, namely the (1) marketable securities plus (2) the Fund's Loan Fund (meaning loan receivables) represent the

assets held for investment and should be at least equals the total participants account balance in order for the Fund to go live.

This investigator also point out to Mr. Albert that according to this memo, the $183,527.00 Cash Reserve Fund with the Bank of New York, the former custodian appears to be unaccounted. The New York Life statement as of December 31, 2000 only shows the $1,063,891.00 cash in the Mainstay Inst. Money Market Fund as transferred to the new custodian. I mentioned to Mr. Albert the according to the audit work papers of Heinzman, this money were transferred to New York Life; however there is no entry recorded. The statement only shows the $43,062,710.62 securities and the $1,063,891.00 cash received by New York Life.

Mr. Albert concluded that Participants Loan Receivables is plan assets. I pointed out to everybody that in the ERISA world, the accounting equation is: **(1) Total Assets minus (2) Total Liabilities equals (3) Net Assets Available for Benefits.** That participants loan receivables is in the assets part and the equation has only three parts.

Mr. Albert did a comparison of the Net Assets Available for Benefits amount and the total participants' account balances as of December 31, 2000 on lined pad. He wrote down the following:

Net Assets Available for Benefits	Total Participants Account Balances
$49,497,552.00 (Including $2,756,494.00 Participants Loan Receivables).	$46,686,166.00

Mr. Albert seems to believe at first that maybe the $2,756,494.00 loan receivables should also be included with the $46,686,166.00 total participants account balances.

I stated that, it's **not correct** to include it simply because that amount was already deducted from the total participants account balance since it was loaned to the participants. That money was already spent by the participants that borrowed it. . On the other hand, the $2,756,494 Loan receivables remained assets of the Fund, the total assets remained the same, however, and the $2,756,494 is just transferred to another category.

To further explain what I stated, I presented Mr. Albert with page 5 of the notes to the financial statements of the Annuity Fund for the year ended December 31, 2000. The note states:

Currently, the amount in each individual account is determined by combining the following:

(a) The amount in each individual account as of the last valuable date;
(b) Plus contributions received on behalf of the participant for the plan year;
(c) Plus loan payments received (principal and interest) from the participant during the plan year;
(d) Less amount paid out, including loans and distributions;
(e) Less Loan interest charged to a participants' individual account;
(f) Plus an amount that approximates investment income, net of investment and administrative expenses as determined by the trustees, allocated to the individual accounts on a uniform basis for that year.

In other words, if you total the aggregate amounts of each individual account balances and adding or subtracting the six (6) items above in each accounts, the total participants account balance as of December 31, 2000 is **$46,686,166.00.**

This investigator also made a comparison on a lined pad of the Net Assets Available for Benefits and the total amount of participants account balances as of December 31, 2000 if **there is no** Participants Loan Receivables, **meaning no participants borrowed money from their account.**

Net Assets Available for Benefits	Total Participants Account Balances
$49,497,552.00	$49,442,660

The $2,756,494.00 is not deducted from the $49,497,552 assets since no money was borrowed by the participants. Remember the asset is always reduced if money is taken out for the purpose of loaning it to the participants. **However**, that same amount is then transformed into Loan receivable and becomes another asset of a different category. So, the total amount of the assets **remained the same.**

Participants account balances is $49,442,660 since all their account balances remained the same because **no body borrowed money.**

As illustrated on this scenario, Net Assets Available for Benefits is equals or more than the Total Participants Account Balances.

I also presented to Mr. Albert the Form 5500, Schedule H, Part IV Item 4I, Assets Held for Investment Purposes at end of Year of the Annuity Fund for 2000.

It reads the following:

Issuer	Interest Rate	Cost	Current Value
Participants Loans	7.750 %	$2,756,494.00	$2,756,494.00

The other documents I presented to Scott Albert are as follows:

a) New York Life Statement of the Annuity Fund trust **(Assets Held for Investment)** as of 12/31/2000, 6/30/2001 and 10/31/2001.

Note: the statement as of 12/31/2000 shows on the bottom that it was printed **2/20/2001.**

This is another proof that before the Fund went "Live" on June 2001, it was already holding the $43,062,710.42 securities, the $1,063,890.55 cash and the Loan Fund (Receivables) of $3,807,621.70 as of December 2000. The combine total of these three is way above the total participant account balance of $46,686,166.00 and not to mentioned the three checking account outside of New York Life that totaled almost $1.5 million and the $183,527 cash that is unaccounted.

The $1.5 million are cash accounts that are mostly plan assets monies.

***Also, this Investigator pointed out to Mr. Albert that the NYL statement as of 6/30/2001 shows that the core fund cost basis figures is $46,686,981.33 (circled) which is the total participants account balance on this date as compared to the $52,155,047.26 Assets Held for Investment.**

Mr. Albert requested from me if he can review the Annuity Fund audit work papers of Heinzman. I showed him the whole package. There is nothing in it to indicate of any short fall. In fact, the Fraud Risk Assessment portion of the audit plan stated that there is "NO" unreconciled difference between net assets available for benefits per the trustee or custodian records and the plan's records.

The regional director then stated that based on the Annuity Fund statement as of December 31, 2000 and if the fund is solely owned by one person, how much that person would get if he or she decides to take all the assets out as a distribution?

The regional director repeated this question to this investigator. On December 4, 2008, this Investigator and the director had a lively discussion at 7:00 PM until 7:30 PM on the issue of Loan Receivables. We were looking at the Annuity Fund financial statements as of December 31, 2000.

Its shows that total net assets available for benefits $49,497,552.00.00 including $2,756,494 Loan Receivables. He stated if this one person who solely owned this fund, for example, takes all the assets, there **would be not enough** to pay the distribution since the $2,756,494 is not a liquid asset that can be converted into cash. He thinks then that Loan Receivables is not an asset.

To answer the question of the regional director (Dec. 15, 2008), this Investigator and was seconded by somebody in the room, stated that this person who solely owned the fund will only received the difference between the total assets minus the loan receivables. This investigator further stated that this person will get IRS Form 1099D with a distribution amount of $2,756,494 because he or she already spent this money that was borrowed before.

This investigator also brought to the attention of Mr. Scott Albert that a complete review of the Annuity Fund Interest Allocation Analysis dated September 28, 2001 was done. At the beginning of the meeting, this Investigator stated that this special project is the basis of the trustees' contention that there was a short fall of fund assets due to the misallocation done by the former plan administrator from 1993 to 1999. I further started that based on my review, this special project is fraudulent. However, for the purpose of this meeting only , is it assumed that it is not.

The review shows that for all the years' concern, Heinzman used figures as Net Assets Available for Benefits, Invested Assets and Net Income that are much lower than what the financial statements for those years show. The difference is by the millions. Below is the summary:

Net Assets Available for Benefits

Year	Financial Statements	S& P (Heinzman)	**Difference**

1999	$ 51,269,070.03	$ 47,809,376.00	$ 3,459,694.03
1998	$ 47,589,210.31	$ 45,546,786.00	$ 2,042,424.31
1997	$ 46,732,642.83	$ 43,046,756.00	$ 3,685,886.83
1996	$ 45,663,664.00	$ 43,311,968.00	$ 2,351,696.00
1995	$ 44,441,859.27	$ 38,588,345.00	$ 5,853,514.27
1994	$ 44,126,411.66	$ 39,488,573.00	$ 4,637,838.66
1993	$ 43,663,139.00	$ 38,059,791.00	$ 5,603,348.00
1993	No financial statement available. Amount from Form 5500 obtained from EDS		

Invested Assets

1999	$ 50,354,065.71	$ 47,547,858.00	$ 2,806,207.71
1998	$ 49,548,687.00	$ 45,546,846.00	$ 4,001,841.00
1997	$ 47,487,909.12	$ 42,672,607.00	$ 4,815,302.12
1996	$ 45,046,731.42	$ 43,331,644.00	$ 1,715,087.42
1995	$ 44,131,641.28	$ 38,604,215.00	$ 5,527,426.28
1994	$ 43,321,862.19	$ 39,476,919.00	$ 3,844,943.19
1993	$ 39,483,004.00	$ 38,060,422.00	$ 1,422,582.00
1993	same as above		

Net Income

1999	$ 2,938,161.46	$ 577,890.00	$ 2,360,271.46
1998	$ 2,967,224.86	$ 1,865,995.00	$ 1,101,229.86
1997	$ 2,385,794.39	$ 2,351,276.00	$ 34,518.39
1996	$ 4,237,151.06	$ (1,866,633.00)	$ 6,103,784.06
1995	$ 1,967,148.19	$ 4,722,587.00	$ (2,755,438.81)
1994	$ 1,343,284.04	$ (538,330.00)	$ 1,881,614.04

	$	$	$
1993	3,344,632.00	1,643,486.00	1,701,146.00
1993	same as above		

Mr. Albert stated that he will review it.

The documents presented to Mr. Albert are included.

The above and the documents included represent my accurate record of what transpired during the meeting with Scott Albert on December 15, 2008.

Respectfully

Jose Castillo

2-29

stillo, Jose - EBSA

From: Kay, Jonathan - EBSA
Sent: Monday, December 22, 2008 3:31 PM
To: Castillo, Jose - EBSA
Subject: Local 12

Jose:

Do you have a contact over at NY Life. Ca I get the individual's name and contact information?

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

Exhibit 2.1

Albert, Scott - EBSA

From: Kay, Jonathan - EBSA
Sent: Tuesday, December 30, 2008 12:11 PM
To: Albert, Scott - EBSA
Subject: FW: Local 12 Annuity Fund
Attachments: NYL docs for NYL 12.29.08.pdf

Scott: Here's NYLife's interpretation. Is it clear enough for your purposes? Do you need anything else on this issue?

From: Crystal Corpus/NYLIM [mailto:Crystal_Corpus@nylim.com]
Sent: Tuesday, December 30, 2008 12:04 PM
To: Kay, Jonathan - EBSA
Cc: michael_hession@nylim.com; Ramona Walsh/NYLIM
Subject: Re: Local 12 Annuity Fund

Mr. Kay,

The response I was provided from our CAM Dept. was in looking at the attached documentation, the Loan Fund is indeed a separate item and in addition to the amounts listed on the first page. Does that help you? Please advise. Thank you.

Reference to Exhibit 2

al Corpus, MPA
Legal Assistant
New York Life Investment Management LLC
Office of the General Counsel
169 Lackawanna Avenue
Parsippany, NJ 07054
Phone: (973) 394-4449
Fax: (973) 394-4637

"Kay, Jonathan - EBSA" <Kay.Jonathan@dol.gov>

12/29/2008 04:14 PM

To <crystal_corpus@nylim.com>
cc
Subject Local 12 Annuity Fund

'orpus:

As I mentioned, we are seeking NY Life's interpretation of two figures that appear on a document that we understand was generated by NY Life. The figures at issue are the $46,686,166.17 amount that appears on the middle of the first

page of the attachment hereto under the column heading "Core Fund" and the $47,607,942.91 amount that appears four lines later. Our specific question is whether either of these figures includes any portion of the "Loan Fund" that appears as the next to last item on page 3 of the attachment hereto? In other words, is the Loan Fund a separate item from, and in addition to, the two participant balance figures referenced above?

Thank you for your assistance.

<<NYL docs for NYL 12.29.08.pdf>>

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

stillo, Jose - EBSA

From: Kay, Jonathan - EBSA
Sent: Tuesday, December 23, 2008 9:44 AM
To: Castillo, Jose - EBSA
Subject: RE: Local 12

I'd like to get in touch with a person that is familiar with the Local 12 accounts. Do you have such a contact?

From: Castillo, Jose - EBSA
Sent: Tuesday, December 23, 2008 8:54 AM
To: Kay, Jonathan - EBSA
Subject: RE: Local 12

Jonathan;

What kind of info do you need? We have most of the info obtained since 2006.

Jose

From: Kay, Jonathan - EBSA
Sent: Monday, December 22, 2008 3:31 PM
To: Castillo, Jose - EBSA
ect: Local 12

Jose:

Do you have a contact over at NY Life. Ca I get the individual's name and contact information?

Jonathan Kay
Regional Director
New York Regional Office
U.S. Department of Labor
Employee Benefits Security Administration
Tel: 212-607-8644
Fax: 212-607-8689

2-30

WITNESS AFFIDAVIT

ame) Robert Goldberg

n an ✓ employee of ___ applicant to ___ former employee of the U.S. Department of Labor's:

(Agency Employee Benefits Security Administration

(Office) New York Regional Office

(Division)

(Branch)

Located in (city and state) New York, New York

In the capacity of (show both your organization title and the classification of your job, if different):

Supervisory Investigator

Grade 14 between (date) October 1, 2006 and (date) Present

My telephone number during working hours is: (212) 607-8624

[Acting Supervisory Investigator October 6, 2005 - February 10, 2006 However, remained supervisor on the Local 12 Benefit Fund cases to present.]

I HAVE BEEN ADVISED OF THE FOLLOWING:

I am required by Federal regulations and Department of Labor policy to cooperate fully with the investigator who has been assigned to conduct an impartial and appropriate investigation into a complaint of discrimination against the Department of Labor. I must provide a statement for the investigative record that is true and complete to the best of my knowledge and belief and fully discloses all of my firsthand knowledge having a bearing on the merits of the complaint. My statement is made under oath (or ~rmation), without a pledge of confidentiality, in accordance with the rules, regulations, policies, and procedures of the Equal loyment Opportunity Commission and the Department of Labor. This means that any employee(s) whom I accuse of ..crimination or other acts of impropriety may be shown this statement or relevant portions and be given an opportunity to respond. In addition, the Complainant and the appropriate Department of Labor officials involved in the EEO complaint process will receive the entire investigative report. I have the right to review my statement prior to signing it and may make initialized corrections if it is incomplete or inaccurate. I have the right to receive a copy of the signed statement.

I am entitled to representation by a person of my choice during my participation in the EEO process (so long as my choice does not result in a conflict of interest). I have ___ have not ✓ chosen a personal representative at this time.

EEO regulations specifically protect participants in the EEO complaint process from any acts of reprisal, discrimination, coercion, harassment, restraint, or interference as a result of their participation in the EEO complaint process.

Having been advised of the above information about my role as a witness in the investigative process, I solemnly ✓ swear or ✓ affirm that the statement to follow is true and complete to the best of my knowledge and belief, and fully addresses the issues and concerns raised by the investigator.

NOV 30 2006

#473622

Witness Response
Witness: **Robert Goldberg**
EEO Complaint of Jose Castillo Case No. 06-02-023

My name is Robert Goldberg and my current position is Supervisory Investigator in the New York Regional Office of the Employee Benefits Security Administration, which is part of the Department of Labor.

I became an Acting Supervisory Investigator on Thursday October 6, 2005. At that time, I became the manager of Investigator Jose Castillo and supervised Mr. Castillo's cases, including his investigation of the Local 12 Benefit Funds (the "Plans").

I believe that Mr. Castillo's investigation of the Plans has not been "undermined". It is my view that Mr. Castillo's actions involving the investigation have been either insubordinate or incompetent.

Mr. Castillo's investigation of the Plans has not been up to EBSA standards. I have had to take an active role from the moment I got involved with the investigation. Mr. Castillo has not obtained sufficient facts and documentation to properly support the issues that he raised. Also, his case files are disorganized. As a result of his lack of organization and his inability to obtain sufficient documentation, the investigation has taken very long time. I have had to monitor what he has been doing and make recommendations to him on an on-going basis. This has not been easy task since Mr. Castillo has not been forthcoming with the documentation that he maintains or the documentation that he plans to obtain. At settlement meetings with Plan officials and Plan counsel, Mr. Castillo had not been sufficiently prepared to discuss issues. Consequently, he has had limited participation at these meetings. Also, since Mr. Castillo has not been organized, he has not able to sufficiently brief me on the issues before these meetings. Consequently, I have had to make several statements at these meetings that turned out not to be true.

He has not been objective while conducting the investigation. Mr. Castillo has not followed proper EBSA procedures dealing with Plan officials who are represented. According to EBSA procedures, all communication would normally go through counsel. Mr. Castillo has ignored Plan Counsel and has sent all of his requests directly to Plan officials.

To further support my views, below are some examples of instances where Mr. Castillo's performance was not adequate in this case, requiring me to take an active supervisory role.

Prior to an important meeting, Mr. Castillo did not properly brief me on the nature of the meeting which would take place with Plan officials. Instead, Mr. Castillo casually informed me that the meeting would be just about ironing out the numbers regarding the issues in the Voluntary Compliance letter that he issued and not a discussion about the issues themselves. Instead, the meeting involved the issues and I was not prepared discussed them, which resulted in the Department looking unprepared. As a supervisor, it

Exhibit 15
Page 2 of 9 Pages

is imperative that I am properly informed about the nature of all meetings, and this is commonly known by all investigators.

At this meeting which occurred on Monday November 7, 2005, Mr. Castillo was not sufficiently prepared, as he should have been, to discuss the issues with Plan officials. It should be noted that, I had to apologize to the Plan officials because the Department was not sufficiently prepared to discuss the issues. This was Mr. Castillo's fault.

After that meeting, I met with Mr. Castillo and reviewed his case files with him. After this review, it became apparent to me that he did not have sufficient documentation to support the allegations. This failure to have sufficient documentation at such a late stage in the investigation, where it would have been expected of him, indicates that the investigation was not done properly.

My review of Mr. Castillo's case files had led me to conclude that the files were disorganized, and that I had not seen all of the documents.

At a second meeting on January 9, 2006, although it was Mr. Castillo's case, it was necessary for me to take a primary role because of Mr. Castillo's lack of objectivity in his analysis of the evidence. I started the meeting by briefing the Plan officials on the aspects of the case, which I had been briefed on by Mr. Castillo. As I was doing this, the Plan officials advised me that I did not have the facts straight. At this point, I needed Mr. Castillo's input regarding the specific facts, however, he did not provide that input. He did this without an explanation. This was an embarrassment to me as a supervisor. As the investigator in the case, it was Mr. Castillo's responsibility to know the facts in the case to provide input at the meeting.

Before a third meeting with Plan officials, Mr. Castillo had again not properly briefed me about all important issues. Just prior to the third meeting, he suddenly showed me a letter sent to him from a Plan participant back in November 2005, which should have been shown to me two months before.

During the investigation Mr. Castillo has revealed directly to the participant what he as received and what he has been doing during the investigation. This is against EBSA policy because it obviously can affect the case in a negative way.

Mr. Castillo has also improperly communicated directly with Plan Officials when represented by counsel, which is also against EBSA policy.

It again become apparent to me that Mr. Castillo had not properly maintained documents that he had already received when on numerous occasions, Plan counsel complained that Mr. Castillo had asked for the same documents two and three times.

At a third meeting on January 30, 2006, Mr. Castillo was again not properly prepared and did not sufficiently participate. At that meeting, Mr. Castillo was also not sufficiently objective.

Exhibit F5
Page 3 of 9 Pages

On May 18, 2006, I accompanied Mr. Castillo to interview the Plan Manager. Although I was to ask the questions, Mr. Castillo had not sufficiently briefed me regarding what information he had previously acquired. I asked certain questions that Mr. Castillo apparently already had the information about. This caused embarrassment to me, delays in conducting the interview, and it negatively reflected the Department of Labor's professionalism. It was Mr. Castillo's responsibility to brief me on what information he already obtained and he did not.

At a meeting on June 30, 2006 with Plan officials and Plan accountant Schultheis and Panettieri, representatives from Schultheis and Panettieri indicated that the Department did not have all of the documentation regarding certain issues in the Voluntary Compliance letter. It was decided that Mr. Castillo would set up an appointment in the near future to go out to the offices of Schultheis and Panettieri to review the additional documents regarding the issues. Also, I informed all of the parties that I was going to Washington, D.C. on a detail for three months and would not be back until October 2006.

For the three months that I was down in Washington, D.C., Mr. Castillo not only did not set up that meeting with Schultheis and Panettieri, but did not do much work on the Local 12 Benefit Fund cases. He did send out tolling agreements where he failed to follow-up to get the signatures on the agreements from all pertinent parties. He did discuss with me in September 2006, while I was in Washington, D.C., the additional documents that I thought that he needed to obtain from the Plans and Schultheis and Panettieri. After this discussion, he did send out letters to these parties requesting documents. However, Mr. Castillo did not follow-up to get those documents when they were not received within a reasonable period of time. When I got back from Washington, D.C. in October 2006, I called Plan counsel to obtain the documents requested.

Also, shortly after I got back from Washington, D.C., Mr. Castillo showed me documentation that he received from a service provider that he claimed indicated that Schultheis and Panettieri were not honest. After I reviewed this documentation, I advised Mr. Castillo that without more information I could not agree with this assessment. I told Mr. Castillo that we needed to get an explanation of what the documentation represented before we accused anybody of any wrongdoing. Mr. Castillo did not like my answer and then went to other investigators in the office showing the documentation trying to get them to agree with his view. I felt this to be extremely out of line.

During this past month, Mr. Castillo has insulted me by telling me that I was the reason why the investigation was taking too long. Also, Mr. Castillo informed me that if I did not agree with his view that Schultheis and Panettieri were not honest, then he would contact James Hampton in OPPEM (higher level personal officials in the agency) in Washington, D.C. I reiterated to him that we still needed to get documentation to proof his allegation.

Exhibit FF
Page 4 of 9 Pages

I have not received any assistance in preparing this statement and my statement has not been reviewed by anyone other than an attorney from the Office of the Solicitor. The attorney from the Office of the Solicitor in New York that reviewed my statement was James A. Magenheimer. His address and telephone number is below:

James A. Magenheimer
Counsel For Civil Rights
U.S. Department Of Labor
Office Of The Solicitor
201 Varick Street, Room 983
New York, New York 10014
(212) 337-2102

Exhibit F5
Page 5 of 9 Pages

Affidavit of: Robert Goldberg

I have reviewed this statement, which consists of 6 pages, and hereby solemnly ✓ swear ✓ affirm that it is true and complete to the best of my knowledge and belief. I understand that the information I have given will not be held confidential, will become a permanent part of the record of investigation, and may be shown to any necessary party.

Robert Goldberg — 11/29/06

(Signature of Affiant) (Date)

Signed before/received by me at (Street and City) 33 WHITEHALL ST NY NY

on this 29 day of NOVEMBER, 2006

(Signature of Investigator/Witness)

CRC Form 10
(Rev. 3/03)

Exhibit F5
Page 6 of 9 Pages

Initials: R.G.

2-31

U.S. Department of Labor

Employee Benefits Security Administration
33 Whitehall St. - 12th Floor
New York, NY 10004
Phone: (212) 607-8600
Telefax: (212) 607-8681

MAR 20 2006

March 20, 2006

Via Certified Mail Return Receipt Requested

Schultheis & Panettieri, LLP
210 Marcus Boulevard
Hauppauge, NY 11788-3701

Attn: James Heinzman, CPA

Re: Local 12 Asbestos Workers Annuity Fund
Case No. 30-099939

Dear Mr. Heinzman:

The Department of Labor ("Department") has responsibility for the administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as the Local 12 Asbestos Workers Annuity Fund. ("Fund").

Based on the authority granted to the Secretary of Labor by Section 504 of ERISA, the department conducts investigations of employee benefit plans. Section 504 of ERISA, 29 U.S.C. 1134, states, in part, that: "the Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder . . . to make an investigation, and in connection therewith, to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this title. . . ."

As you are aware, the above referenced Fund is currently being reviewed by this office to determine its compliance with ERISA. The Department is requesting that you provide us with data/information requested below:

1) Annuity Fund Interest Allocation Analysis 1990-2000
September 28, 2001

According to the background, this project was conducted to determine the reasonableness of earning allocations to the participant accounts as compared to actual investment earnings for the period 1990 through 2000.

1) Please provide the Department with information on **who** specifically in the Fund's management requested Schultheis & Panettieri to perform this project.

3)

2) And secondly, if this particular person or persons provided **you** with information on **who** brought to managements' attention that amounts allocated to participants' accounts have **not been** consistent with actual investment earnings and **what document is named as the source of this information.**

Please respond to item 1 and 2.

We are requesting that you submit the data/information in writing within five (5) days of your receipt of this letter.

Thank you for your cooperation.

Jose Castillo
Investigator
212-607-8650

CC: Sherwin Kaplan
Thelen Reid & Priest LLP
701 Eighth Street, NW
Washington, DC 20001-3721