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# Report of Interview

**U.S. Department of Labor**
**Office of Inspector General**

**OIG Form 103 (OI-6/08)**

| **Interview Date:** | April 28, 2009 | **Location:** | 200 Constitution Ave<br>Suite 600<br>Washington, DC | **Case Number:** | 14-2601-0004 IA |
|---|---|---|---|---|---|
| **Subject:** | Virginia C. Smith | **Prepared By:** | Robert W. Wyche RW | **Date Prepared:** | April 28, 2009 |

On April 28, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Virginia C. Smith, Director of Enforcement, Office of Enforcement, Employee Benefits Security Administration (EBSA), United States Department of Labor (DOL), 200 Constitution Avenue, NW, Suite 600, Washington, DC. Prior to the interview, AIG Cunningham and I identified ourselves and obtained a Garity warning from Director Smith, which she read and signed, agreeing to answer questions in this investigation.

Director Smith explained that as director of enforcement for the Office of Enforcement, EBSA, her duties include oversight of all of the EBSA investigations within EBSA. Director Smith believes she first became aware of the Asbestos Workers Local 12 Funds investigation after being carbon copied on various e-mails, which were sent to EBSA and other DOL officials by Mr. , a retired Asbestos Workers Local 12 Union member.

Director Smith recalls that after reviewing the Asbestos Workers Local 12 Funds investigation, she determined that it was not a well-managed case and had been progressing slowly. According to Director Smith, this was one of several investigations in EBSA's New York Regional Office (RO) that was not progressing in accordance with EBSA's case performance measures. EBSA's case performance measures allow only a certain number of cases to remain open past a specified time period within an EBSA office. Director Smith identified the Asbestos Workers Local 12 Funds investigation as a case that lacked managerial oversight due to poor management. Director Smith does not attribute the mismanagement of the investigation to any delay tactics by the New York RO supervisors to make Jose Castillo, Investigator, EBSA, New York RO look bad.

Director Smith first became aware of Mr. Castillo's allegations and complaints as a result of e-mails he sent to the Secretary of Labor and other individuals outside of EBSA. While reviewing these e-mails and their attachments, Director Smith noticed that Mr. Castillo was providing these individuals confidential information relating to the investigation, which is against EBSA policy. Mr. Castillo was informed by Regional Director Jonathan Kay, EBSA, New York RO to discontinue this practice.

After the retirement of Jeffrey Gaynor, Deputy Director, EBSA, New York RO, Director Smith temporarily assigned Jeffrey A. Monhart, Chief, Division of Field Operations, Office of

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Enforcement, EBSA, Washington, DC, as Acting Deputy Director, EBSA, New York RO. According to Director Smith, this decision was made for a variety of reasons, which included:

- Providing Chief Monhart with an opportunity to develop field experience.
- Utilizing Chief Monhart to develop and assist new and inexperienced managers in EBSA's New York RO.
- Using Chief Monhart's experience and knowledge to assist with EBSA's case management.
- Allowing Chief Monhart to provide assistance in the Asbestos Workers Local 12 Funds investigation.

Director Smith believes that Chief Monhart was successful in providing oversight and assistance in the Asbestos Workers Local 12 Funds investigation, which helped to move the case along.

One of Mr. Castillo's allegations was that Regional Director Kay went against Chief Monhart's decision to depose James Heinzman CPA, (accounting firm of Schultheis and Panettieri representing the Asbestos Workers Local 12 Union Funds) regarding Schultheis and Panettieri's position on the issues of Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo advised that he was told by Regional Director Kay not to depose Mr. Heinzman but to conduct a telephonic interview with him.

Regarding this allegation, Director Smith commented she had no direct knowledge of the incident; however, stated it would not be unusual for a Regional Director to make a decision not to depose a witness in an investigation. Director Smith advised that it is rare for EBSA offices to depose witnesses during the investigative stage of a case and believes the decision not to may have been deemed by Regional Director Kay to be unnecessary as well as not being cost effective.

Director Smith was asked about Regional Director Kay's notification to Mr. Castillo not to contact anyone involved in the Asbestos Workers Local 12 Funds investigation without approval from Mr. Goldberg or former Deputy Director Gaynor. Director Smith reported the practice of not discussing investigations with union members or witnesses is standard operating procedure and to do so would be in violation of EBSA's enforcement manual, (chapter 20, paragraph 2b).

Director Smith further revealed that it was feared Mr. Castillo was providing Mr. Schroeder and other former Asbestos Workers Local 12 Union employees with confidential investigative material. In addition, it was believed that Mr. Castillo was also discussing settlement issues

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with Asbestos Workers Local 12 union trustees outside the scope of his authority as a EBSA investigator.
Director Smith stated she met with Regional Director Kay and Patricia Rodenhausen, Regional Solicitor of Labor (RSOL), Office of the Solicitor (SOL), New York Region on April 21, 2009 and discussed the status of the Asbestos Workers Local 12 Funds investigation. Director Smith advised that the four remaining issues in Part 2 of the Asbestos Workers Local 12 Funds investigation have now been resolved and the investigation should be closed shortly.

Director Smith admits there were management flaws from all levels in the New York RO with respect to the oversight of the Asbestos Workers Local 12 Funds investigation and other investigations, but attributes this only to inexperienced managers and not a grand scheme to prevent Mr. Castillo from being promoted.

At the conclusion of the interview, Director Smith was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

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# AFFIDAVIT

City: Washington, DC Date: May 21, 2009

State: ______________ Time: 2:00 pm

Virginia C. Smith being duly sworn, deposes and states:

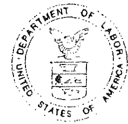
VCS 5-21-09

Case Number: 14-2601 0004 IA Page 1 of 4 Deponent's Initials

OIG 118A (OLRFI 9/05)

U.S. Department of Labor

Employee Benefits Security Administration
Office of Enforcement
200 Constitution Avenue, N.W. Suite 600
Washington, D.C. 20210



DATE: May 14, 2009

MEMORANDUM FOR: ROBERT W. WYCHE
GENE CUNNINGHAM
Office of Inspections and Special Investigations
U.S. Department of Labor Office of Inspector General

FROM: VIRGINIA C. SMITH VCS
Director of Enforcement

SUBJECT: EBSA Investigation of the Local 12 Asbestos Workers Annuity Fund

This will summarize the information I gave you during our meeting on April 28, 2009.

EBSA's New York region opened its investigation of the Local 12 Asbestos Workers Annuity Fund in February 2002, and the case was assigned to investigator Jose Castillo. I became aware of the investigation in early 2006, when my office, the Office of Enforcement (OE), received a copy of a letter written by plan participant to the New York Regional Director. Upon receiving Mr. 's letter, OE looked into the matter, and became aware of delays in completing the investigation. Once this came to our attention, we took steps to assist the New York region in managing the investigation. This is a normal part of our oversight function.

In May 2007, I sent OE's Division of Field Operations Chief, Jeffrey Monhart, to the New York region on a three month detail to serve as the New York Acting Deputy Regional Director. The detail was designed to provide Mr. Monhart with field management experience, and to provide assistance to the New York Regional Director while the Deputy position was vacant. I tasked Mr. Monhart with a number of assignments, most of which were designed to provide management assistance to the New York region on certain of their civil investigations. One of these investigations was the Local 12 Asbestos Workers Annuity Fund. Mr. Monhart was told to review investigative documents, hold meetings with the investigator and managers on the case, and recommend case strategy. I believe that Mr. Monhart was successful in forging a productive relationship with Investigator Castillo. While Mr. Monhart was on his detail, some progress was made on the investigation.

Some time in 2008, Investigator Castillo sent an email to the Secretary of Labor alleging a cover-up by EBSA related to the Local 12 investigation. Because of the vagueness of the allegation, I instructed Mr. Monhart to interview Mr. Castillo in order to ascertain whether Mr. Castillo had any specific information that such an alleged cover-up exists. Mr. Monhart reported back to me that he was satisfied that Mr. Castillo did not have any credible evidence of a cover-up. However, this allegation by Mr. Castillo did result in increased and more direct oversight of the investigation by OE. We did not find anything improper in how the New York region handled the case, although we did conclude that the case was allowed to languish in part because management oversight was not as good as it should have been. This was most likely due to the inexperience of the New York region's managers. Regional Director Jon Kay was appointed in August 2005, and Group Supervisor Robert Goldberg was appointed in October 2006.

One incident that concerned me occurred during late 2008. Mr. Castillo began sending emails containing investigative information to people outside EBSA. EBSA has a longstanding policy against disclosing confidential investigative information outside of EBSA (see *EBSA Enforcement Manual*, Chapter 20, paragraph 2.b.). By forwarding such materials, Mr. Castillo was violating agency rules and procedures. I asked the New York Regional Director to notify Mr. Castillo that he should cease supplying investigative information to people outside the agency. On December 17, 2008, Mr. Castillo received an email to that effect, and he did stop releasing information as far as we know.

Statement of Virginia C. Smith Date: May 21, 2009

VCS 5-21-09

I have read this statement consisting of 4 pages. I have been given an opportunity to make corrections. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 21 day of May, 2009

Virginia C. Smith
Deponent's Signature

Subscribed and sworn before:

[signature]
Special Agent

5/21/09
Date

Witnessed by: [signature]　Case Number: 14-2601-0004 IA

Title: [signature]

OIG 118C (OLRFI 9/05)

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# Report of Interview

**U.S. Department of Labor**
**Office of Inspector General**

**OIG Form 103 (OI-6/08)**

| **Interview Date:** | February 12 and 13, 2009 | **Location:** | EBSA 33 Whitehall Street, New York, NY | **Case Number:** | 14-2601-0004IA |
|---|---|---|---|---|---|
| **Subject:** | Jose Castillo | **Prepared By:** | Robert W. Wyche RW | **Date Prepared:** | February 18, 2009 |

On February 12 and 13, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Jose Castillo at the Employee Benefits Security Administration (EBSA), New York Regional Office, United States Department of Labor (DOL), 33 Whitehall Street, Suite 1200, New York, New York. Prior to the interview, AIG Cunningham and I identified ourselves and obtained the following personal information:

Name: Jose Castillo
DOB:
Home Address:

Home Telephone:
Work Telephone:
EOD Date:
Title:
Years in Current Position:

Mr. Castillo was given a Garity warning at the onset of both interviews, which he read and signed, agreeing to answer questions in this investigation. When first asked to identify individuals he felt were involved in his allegation of hindering and interfering with the 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 (Asbestos Workers Local 12 Funds) investigation, which he was assigned to as the lead investigator, Mr. Castillo provided the following names:

- Jonathan Kay, Regional Director, New York Region, EBSA
- Jeffery Gaynor, Deputy Director, retired, New York Region, EBSA
- Robert Goldberg, Group Supervisor, New York Region, EBSA
- Patricia Rodenhausen, Regional Solicitor of Labor (RSOL), Office of the Solicitor (SOL), New York Region

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- Jennefer Weekly, Attorney, New York Region, SOL
- Sherwin Kaplan, Attorney, Thelen, Reid, Brown, Raysman and Steiner (attorney representing the accounting firm of Schultheis and Panettieri)

Mr. Castillo was then asked to specifically state his allegation(s) and describe the involvement of the above individuals. The following allegations were identified by Mr. Castillo:

- All of the above individuals have played a role in delaying the Asbestos Workers Local 12 Funds investigation by "stalling" the investigation past the end date of the criminal statute of limitations.
- Regional Director Kay delayed the Asbestos Workers Local 12 Funds investigation to support his claim that he (Castillo) was doing a poor job with the investigation, which would give Jonathan Kay an excuse not to promote him.
- Regional Director Kay directed Deputy Director Gaynor and Robert Goldberg to delay requests by Mr. Castillo relating to the Asbestos Workers Local 12 Funds investigation.
- Regional Director Kay influenced his wife, RSOL Rodenhausen, to also delay the Asbestos Workers Local 12 Funds investigation from SOL.
- RSOL Rodenhausen banned Mr. Castillo from attending meetings held at SOL pertaining to the Asbestos Workers Local 12 Funds investigation.
- SOL Attorney Jennifer Weekley caused delays in the Asbestos Workers Local 12 Funds investigation by disagreeing with Mr. Castillo's investigative theories and soliciting outside interpretation, which has and is slowing down the Asbestos Workers Local 12 Funds investigation.
- Attorney Sherwin Kaplan, who represents the Asbestos Workers Local 12 trustees' accounting firm of Schultheis and Panettieri, purposely disagreed with the issues raised by Mr. Castillo to delay the investigation.
- Mr. Kaplan, due to his prior employment with EBSA and personal friendship with Regional Director Kay and his wife RSOL Rodenhausen, has influenced EBSA and SOL management to side with the Asbestos Workers Local 12 trustees on some of Mr. Castillo's investigative issues.

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Mr. Castillo advised that his initial concerns supporting his allegations began on or about May 3, 2005, after he drafted a voluntary compliance (VC) letter outlining the issues identified by him in the Asbestos Workers Local 12 Funds investigation, which was signed by his group supervisor, Jonathan Brown, who shortly after, retired.

A VC letter was described by Mr. Castillo as a letter from EBSA to the union trustees outlining the various violations/issues identified by EBSA during their investigation. After a VC letter is sent, a settlement meeting is scheduled by EBSA with the union trustees to review the details of EBSA's findings and reach a settlement agreement in lieu of further civil action. It should be noted a VC letter is used in regards to potential civil matters, not criminal. Violations identified in an EBSA investigation as criminal are forwarded to a separate criminal unit for prosecution. The issues identified by Mr. Castillo in the Asbestos Workers Local 12 Funds investigation, during this time were civil matters, which were forwarded to SOL.

According to Mr. Castillo, settlement meetings in these cases are usually non productive and end without resolution. He believes this to be the strategy of the union trustees in order to reschedule numerous meetings to extend the investigation beyond the statute of limitations.

Mr. Castillo identified three settlement meetings associated with the Asbestos Workers Local 12 Funds investigation, which took place on November 7, 2005, January 9, 2006 and January 30, 2006. Mr. Castillo identified the following individuals, in addition to himself, who were present at these meetings:

November 7, 2005 Meeting

- Robert Goldberg
- Robert Trujillo (former EBSA investigator, who assisted Castillo in his investigation.)
- Nick Grgas (Local 12 Union employee trustee)
- Joseph Leo (Local 12 Union employee trustee)
- Edward Mahoney (Local 12 Union employer trustee
- Dennis Ippolito (Local 12 Union Business Manager, 25-19 43rd Avenue, Long Island City, New York, 718/784-3456)

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- Matty Aracich (

)

- Denis Engle (Counsel for the Local 12 Union, Denis A. Engel, Esq., 1225 Franklin Avenue, Suite 450, Garden City, New York)

According to Mr. Castillo, Mr. Goldberg had only been assigned as his supervisor for approximately one month prior to this meeting. Mr. Castillo stated Mr. Goldberg never asked him for any documents related to his investigation prior to this meeting and never spoke during this meeting. Mr. Castillo maintains he ran the meeting, which lasted for three or four hours, and had complained during the meeting to Mr. Engle, who brought no supporting documentation to the meeting to support his arguments against Mr. Castillo's findings.

During this meeting, Mr. Castillo described an incident where he noticed Mr. Goldberg, who was seated behind him make facial gestures, while he was addressing the group at the meeting. Mr. Castillo did not confront Mr. Goldberg regarding this incident; however, felt his actions were disruptive to the meeting and unprofessional. Mr. Castillo offers as evidence of this incident an e-mail from Asbestos Workers Local 12 annuity fund recipient dated April 3, 2006, advising him that Asbestos Workers Local 12 trustee Nick Grgas told Mr. Schroeder of observing Mr. Goldberg making facial gestures behind his (Castillo's) back during the meeting.

<u>January 9, 2006 Meeting</u>

- Robert Goldberg
- Sherwin Kaplan
- Dennis Ippolito
- Union Trustees (specific names not recalled by Mr. Castillo)
- James Heinzman (CPA, accounting firm representing the ,Asbestos Workers Local 12 Union Funds - Schultheis and Panettieri, 210 Marcus Boulevard, Hauppauge, New York, 631/273-4778)

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January 30, 2006 Meeting

- Robert Goldberg
- Sherwin Kaplan
- James Heinzman
- Union Trustees (specific names not recalled by Mr. Castillo)

Mr. Castillo also described these two meetings as unproductive, with Mr. Kaplan and Mr. Heinzman wanting to discuss details of the investigative issues without supporting documentation. According to Mr. Castillo, he also ran these two meetings, doing all of the talking, the only exception being when Mr. Goldberg spoke to disagree with him. Mr. Castillo advised that after the January 30, 2006 meeting, Mr. Goldberg told him to eliminate all of the accounting issues related to his findings in order to expedite the settlement process. Mr. Castillo felt this request was unusual and raised some concern with him. Mr. Castillo stated the last two meetings also ended with no resolution towards a settlement.

Mr. Castillo maintains that Mr. Goldberg never asked him for information or documents prior to the settlement meetings and was never prepared to discuss any of the investigative issues during these meetings. Mr. Castillo also maintains he never became upset at these meetings and never called anyone a liar because they disagreed with his findings. According to Mr. Castillo, a Report of Interview (ROI) would normally be submitted to the RSOL after three unsuccessful settlement meetings to initiate civil proceedings.

In February 2006, Mr. Castillo stated Nichell Langone replaced Mr. Goldberg as his group supervisor resulting from a management rotation system that was put into place by Regional Directory Kay to temporarily fill the position of Jonathan Brown, who had retired. According to Mr. Castillo, Mr. Goldberg remained as his "special supervisor" overseeing the Asbestos Workers Local 12 Funds investigation due to the complexity of the investigation, which was explained to him by Regional Director Kay. Mr. Castillo added that Regional Director Kay told him the investigation was too complicated for Ms. Langone and that Mr. Goldberg was more experienced in the complex accounting issues. Mr. Castillo advised Ms. Langone told him Mr. Goldberg would oversee the Asbestos Workers Local 12 Funds investigation due to his familiarity with the case.

At this time, Mr. Castillo again expressed concern over the lack of progress of the Asbestos Workers Local 12 Funds investigation with Regional Director Kay. Mr. Castillo complained that Mr. Goldberg would not allow him to write his ROI at this time

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because he didn't agree with his findings, felt at this time the investigation was unsatisfactory, felt that his evidence was "flimsy" and suggested that Asbestos Workers Local 12 Union trustees might be having difficulty understanding him because of his accent. Mr. Castillo also sited the information provided to him by Mr. Asbestos Workers Local 12 Annuity Funds participant, in his April 3, 2006 e-mail regarding Mr. Goldberg's facial expressions directed towards him during a settlement meeting. According to Mr. Castillo, Regional Director Kay was unresponsive to his concerns.

Mr. Castillo advised that in April 2006, Regional Director Kay instructed Jeffery Gaynor, Deputy Director, EBSA, New York Regional Office, DOL to get involved in the case and along with Mr. Goldberg, provide guidance and direction to the Asbestos Workers Local 12 Funds investigation. Mr. Castillo expressed similar complaints regarding Deputy Director Gaynor and feels that although Deputy Director Gaynor had asked him for all of the documents related to the Asbestos Workers Local 12 Funds investigation, he never reviewed them and was unfamiliar with the case.

On three occasions, June 14, 2006, November 3, 2006 and March 6, 2007, Mr. Castillo, at the direction of Regional Director Kay, met with James Heinzman, CPA, of Schultheis and Panettieri, located at 210 Marcus Boulevard, Hauppauge, New York, 631/273-4778. The purpose of these meetings was to present and discuss Mr. Castillo's findings that $381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings were used by the Asbestos Workers Local 12 Union Plan Administrator as employer contributions instead of being allocated to the fund participants. Mr. Goldberg was also present at these meetings. Mr. Castillo complained that the June 14, 2006 meeting originally scheduled for June 29, 2006 had to be rescheduled to accommodate Mr. Goldberg's schedule, who was being detailed to Washington, DC for 90 days beginning on June 30, 2006.

Mr. Castillo alleges these meetings were unnecessary, a "waste of time" and a "delay tactic" by Regional Director Kay, due to the fact that at two of the meetings, Mr. Heinzman failed to provide documentation to dispute Mr. Castillo's findings. The documentation present by Mr. Heinzman during the November 3, 2006 meeting failed to address the purpose of the meeting, which was to discuss the issue of the investment earnings being used as employer contributions. Mr. Castillo identified Sara Pikofsky, attorney, Thelen, Reid, Brown, Raysman and Steiner (law firm representing the accounting firm of Schultheis and Panettieri), who was present during the March 6, 2007 meeting and told Mr. Castillo after the meeting that his case was week. Ms. Pikofsky also told Mr. Castillo she was a former SOL employee in Washington, DC under Alan Leibowitz.

Mr. Castillo also expressed his frustration due to the fact that both Mr. Goldberg and

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Deputy Director Gaynor disagreed with his assessments and felt the Asbestos Workers Local 12 Plan Document allows investment earnings to be used as employer contributions. Mr. Castillo alleges there is no such thing as a Plan Document that involves this type of transaction.

Mr. Castillo further complained that former Deputy Director Gaynor had been communicating with Denis Engle, Asbestos Workers Local 12 Union trustees attorney without his participation and disputing Mr. Catstillo's investigative findings. Again, Mr. Castillo took issue with the fact that his findings are discarded without supporting documentation to dispute them.

Mr. Castillo stated he received an e-mail from Regional Director Kay on November 7, 2006 advising him not to contact anyone in relation to the Asbestos Workers Local 12 Funds investigation without first obtaining permission from Deputy Director Gaynor or Mr. Goldberg.

During this time period, Mr. Castillo's supervisor Miss Langone and his "special supervisor" Mr. Goldberg were both away from the office for training and on temporary assignment, during which, Michael Briglia was assigned as his acting supervisor. Mr. Castillo brought the Asbestos Workers Local 12 Funds case to Mr. Briglia to review and stated Mr. Briglia, who informed him he believed "serious criminal violations" existed and that he would further discuss this with Miss Langone. Mr. Castillo advised he was contacted by Mr. Briglia the next day, who informed him he could no longer discuss the Asbestos Workers Local 12 Funds investigation with him.

According to Mr. Castillo, the Asbestos Workers Local 12 Funds investigation continued to be delayed after further telephone conversations with Mr. Heinzman and Ms. Pikofsky, and an interview with Asbestos Workers Local 12 Plan Administrator Alan Wassel, both of which again failed to provided any proof disclaiming Mr. Castillo's investigative findings.

Mr. Castillo advised he was allowed to submit the Asbestos Workers Local 12 Funds ROI on May 4, 2007. It was at this time he stated Regional Director Kay decided to exclude, for the time being, the issue that $381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings were used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the fund participants. Mr. Castillo indicated that Regional Director Kay and Mr. Goldberg told him he needed more information and proof before EBSA could proceed in presenting this issue.

At this time, the Asbestos Workers Local 12 Funds investigation was divided into Part 1 and Part 2, the later addressing the investment earnings and employer contributions.

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Part 1 of the Asbestos Workers Local 12 Funds investigation was forwarded to the New York Regional SOL 201 Varick Street, Suite 983, New York, New York, and was assigned to SOL attorney Jennifer Weekley. In October, 2007, the New York Regional SOL was authorized by the U.S. Department of Justice, Washington, DC to file a civil case against the Asbestos Workers Local 12 Union trustees based on the information from Part 1 of the Asbestos Workers Local 12 Funds ROI. A settlement meeting was held on December 7, 2007, which was attended by Mr. Castillo, Mr. Goldberg, Ms. Weekley and counsel for the Asbestos Workers Local 12 Union, during which they agreed to a settlement, which was signed on April 17, 2008. As a result of this settlement, all civil action pertaining to Part 1 of the Asbestos Workers Local 12 Funds investigation was dropped.

While the settlement agreement for Part 1 of the Asbestos Workers Local 12 Funds investigation was being obtained, Mr. Castillo continued his efforts to convince his supervisors and the Asbestos Workers Local 12 trustees, accountants and attorneys that his investigative findings in Part 2 of the Asbestos Workers Local 12 Funds investigation revealed violations by the Asbestos Workers Local 12 Union.

Mr. Castillo identified the following four violations of the fiduciary provisions of Title I of Employee Retirement Income Security Act (ERISA) in Part 2 of the Asbestos Workers Local 12 Funds investigation and indicated he first noticed this discrepancy in 2007; however, the criminal statute could not be applied because the transaction in question took place in 2001 and 2002.

1. During the 2000 to 2001 plan year, approximately $381,000 in Asbestos Workers Annuity Fund earnings was paid out of the Fund without documentation or written explanation. Mr. Castillo further alleges that the $381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the fund participants.

2. The Asbestos Workers Local 12 Annuity Fund's earnings for calendar year (CY) 2000 (totaling approximately $1.8 million) were not allocated to individual participant accounts, even though the Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations.

3. Employer contributions forwarded to the Asbestos Workers Local 12 Annuity Fund investment account in three separate transactions on October 19, 2001, January 28, 2002 and May 2, 2002 may have been insufficient to cover the amounts due according to the remittance reports for the corresponding period of time.

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4. In three separate transactions on June 6, 2001, November 20, 2001 and January 8, 2002, a total of approximately $1,237,000 in Asbestos Workers Local 12 Welfare Plan assets was transferred to the Asbestos Workers Local 12 Annuity Fund without sufficient documentation or explanation.

In September 2007, Jeff Monhart, Chief, Division of Field Operations, Office of Enforcement, EBSA, Washington, DC, was temporarily detailed to the New York Region EBSA as the Acting Deputy Directory after Deputy Director Gaynor retired. Mr. Castillo stated that Acting Deputy Director Monhart wanted him to obtain a deposition from Mr. Heinzman regarding Schultheis and Panettieri's position on the issues of Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo advised that he was told by Regional Director Kay not to depose Mr. Heinzman but to conduct a telephonic interview with him. Mr. Goldberg then told him to provide Mr. Heinzman with a list of questions prior to the interview. Mr. Castillo stated he prepared a list of questions, which Mr. Goldberg gave to Mr. Heinzman prior to the interview. Mr. Castillo commented on the fact that Regional Director Kay was present during the telephone interview, which was unusual. According to Mr. Castillo, each time he deviated from the questions during the interview, Mr. Heinzman's attorney, Ms. Pikofsky would object.

On December 3, 2007, Mr. Castillo submitted his ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation, which was then forwarded to Ms. Weekley at the New York Region SOL.

Mr. Castillo advised that on January 24, 2008, he, Mr. Goldberg and Ms. Weekley met to specifically discuss Part 2 of the Asbestos Workers Local 12 Funds investigation. According to Mr. Castillo, "things got ugly" when Ms. Weekley began suggesting that the loans receivable should not be included as plan assets. Mr. Castillo protested by responding that the idea was "creative accounting." As a result of the disagreements during this meeting, Mr. Castillo maintains that Ms. Weekley does not want to discuss the Asbestos Workers Local 12 Funds investigation with him and now directs any questions she may have of him through Mr. Goldberg.

In April 2008, Mr. Castillo reported that he participated in a conference call along with Regional Director Kay, Mr. Goldberg, Ms. Weekley, and her supervisor, Dennis Kade, Trial Attorney, EBSA, New York Region, DOL, to again discuss issue three of Part 2 of the Asbestos Workers Local 12 Funds investigation. Again, Mr. Castillo maintained that money from plan assets cannot be used as employer contributions, which now amounts to $421,000 in this investigation due to interest. Mr. Castillo still argues the Asbestos Workers Local 12 Union has never disputed this outside of oral argument because they never provided any documentation to prove what happened to the

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$421,000. Ms. Weekley, according to Mr. Castillo provided a theory for issue three, which questions if plan assets can be used as employer contributions, with which he again did not agree.

Mr. Castillo stated Regional Director Kay decided to solicit information from the Office of Exemption, DOL, Washington, DC in an attempt to interpret his (Castillo's) investigative findings relating to issue three. Mr. Castillo reported that Regional Director Kay drafted an e-mail, which he copied to Mr. Castillo, addressed to Chief Monhart, Office of Enforcement, EBSA, DOL, Washington, DC. This e-mail, according to Castillo, requested Chief Monhart to ask the Office of Exemption if they could exempt the Asbestos Workers Local 12 Plan Administrators actions of using the Annuity Fund's investment earnings as employer contributions. Mr. Castillo could not confirm if this e-mail was actually sent by Regional Director Kay since the copy he received was a draft.

Mr. Castillo believes a request such as this from EBSA is highly unusual explaining that it is usual practice for a union to make such a request, not EBSA. Mr. Castillo also believes that the e-mail was written favorably to reflect the Asbestos Workers Local 12 Union, not EBSA. It is Mr. Castillo's position that the Asbestos Workers Local 12 Union has never tried to claim an exemption for the issue of investment earnings being used as employer contributions, arguing they can account for all of the money, despite never producing supporting documentation.

On May 15, 2008, Mr. Castillo claimed Regional Director Kay, in the presence of Mr. Goldberg informed him he was not to attend any further meetings in relation to the Asbestos Workers Local 12 Funds investigation at SOL due to his one sided view of the issues and his disrespect towards SOL. Mr. Castillo maintains he has never disrespected SOL and has never acted in a disruptive manner at any meetings.

As a result of these actions, Mr. Castillo feels increasingly shut out of the Asbestos Workers Local 12 Funds investigation, despite Mr. Goldberg's claim that he is informed of every aspect of the case and SOL still seeks his input relating to the investigation. Mr. Castillo reported that Mr. Goldberg has not kept him informed of all aspects of the case and has repeatedly criticized his data commenting that "it doesn't pass the smell test." Mr. Castillo provided an example of a meeting which took place on July 31, 2008 regarding Part II of the Asbestos Workers Local 12 Funds investigation, which he was not informed of until late August 2008. According to Mr. Castillo, this meeting was also a waste of time in that the Local 12 Union representatives failed to provide documentation disproving his investigative findings. Mr. Castillo also believes this meeting was staged by Mr. Goldberg and Ms. Weekley in an attempt for them to spin the argument that loan receivables are not plan assets.

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On July 16, 2008, Mr. Castillo stated he attended a field training class designed and conducted by the Office of Regulations (ORI) at 290 Broadway, New York, New York. Mr. Castillo identified Regional Director Kay, Mr. Goldberg, Mr. Kade and Ms. Weekley as also attending the training. During the class, Mr. Castillo asked Dave Lorie ORI, DOL, who was conducting the training, if loans receivable are considered plan assets and he indicated that was correct. Mr. Castillo purposely asked this question in the presence of his managers and SOL employees to discredit their interpretations of his findings in the Asbestos Workers Local 12 Funds investigation.

According to Mr. Castillo, he was informed of additional meetings relating to the Asbestos Workers Local 12 Funds investigation between the dates of July 2008 through November 2008, all of which, in his view, contained a lack of documentation, and a continued failure to disprove his investigative findings.

At the conclusion of the interview, Mr. Castillo was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

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# Report of Interview

**U.S. Department of Labor**
**Office of Inspector General**

**OIG Form 103 (OI-6/08)**

| **Interview Date:** | March 12, 2009 | **Location:** | EBSA 33 Whitehall Street, New York, NY | **Case Number:** | 14-2601-0004IA |
|---|---|---|---|---|---|
| **Subject:** | Jose Castillo | **Prepared By:** | Robert W. Wyche RW | **Date Prepared:** | March 20, 2009 |

On March 12, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Jose Castillo at the Employee Benefits Security Administration (EBSA), New York Regional Office (RO), United States Department of Labor (DOL), 33 Whitehall Street, Suite 1200, New York, New York. Prior to the interview, AIG Cunningham and I identified ourselves and obtained the following personal information:

Name: Jose Castillo
DOB:
Home Address:

Home Telephone:
Work Telephone:
EOD Date:
Title:
Years in Current Position:

This is the second time in this investigation Mr. Castillo has been interviewed, the first interview taking place on February 12 - 13, 2009. Mr. Castillo was given a Garity warning at the onset of the interview, which he read and signed, agreeing to answer questions in this investigation.

Mr. Castillo was first asked to specifically explain how he felt his EBSA supervisors and other individuals stalled or interfered with the Asbestos Workers Local 12 Funds investigation and provided the following statements:

- In November 2005 he discovered that the Asbestos Workers Local 12 Union trustees did not allocate $1.8 million of investment earnings to the Annuity plan participants.

- He viewed this as a criminal violation and advised his immediate supervisor Robert Goldberg, Supervisory Investigator, EBSA, New York RO, who ignored his claim that a criminal violation existed.

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- After he presented his argument to Mr. Goldberg outlining the criminal violation, Mr. Goldberg said nothing and walked out of his office.

- Mr. Goldberg refused to examine any evidence he had supporting his claim of a violation.

- He believes Mr. Goldberg's intentions were to discredit his voluntary compliance letter to the Office of the Solicitor (SOL).

- Regional Director Jonathan Kay, EBSA, New York RO delayed the investigation by requesting the Office of the Chief Accountant (OCA), EBSA, Washington, DC, to review his investigative findings.

- Regional Director Kay, Mr. Goldberg, Patricia Rodenhausen, Regional Solicitor of Labor, SOL, New York Region, DOL, and Jennifer Weekly, Attorney, New York Region, SOL, DOL are all liars because they have indicated that Part 2 of the Asbestos Workers Local 12 Funds investigation contains complex accounting issues.

Mr. Castillo believes the Asbestos Workers Local 12 Funds investigation is a simple investigation and that his supervisors are making complex issues out of simple ones. Mr. Castillo claims his findings indicate that $1.8 million of investment earnings were never allocated to the Asbestos Workers Local 12 funds participants. Mr. Castillo further references the Asbestos Workers local 12 Annuity fund "Notes to Financial Statement Year ending December 31, 2000," which stated no earnings were allocated for the year ending December 31, 2000. Mr. Castillo claims this is an admission by the Asbestos Workers Local 12 Union trustees of a criminal violation of the law.

Mr. Castillo alleges that he discovered this violation in November 2005, which had originally occurred in September 2001 and was still within the criminal statute of limitations. Mr. Castillo further compared this to another violation he discovered in October 2006 involving $380,000 of the Asbestos Workers Local 12 Annuity Fund earnings, which were used as employee contributions instead of the required investment earnings for the fund participants. Mr. Castillo pointed out that this violation occurred on October 19, 2001, which had exceeded the criminal statute of limitations. This issue, according to Mr. Castillo, was being pursued by EBSA as a potential civil violation.

The interview with Mr. Castillo was discontinued for lunch and upon the return of Mr. Castillo, he was again reminded of his Garity rights. It should be noted that after

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lunch, Mr. Castillo began referring to the above issue involving the $1.8 million as a potential civil violation and not a criminal violation. When asked why he was now referring to this as a civil violation, Mr. Castillo stated he never described the non-allocation of $1.8 million to the Annuity fund participant earnings as a criminal violation. Segments of Mr. Castillo's statements from the investigative notes were read back to Mr. Castillo and he again denied claiming the issue was a criminal violation. Mr. Castillo's statements now conflicted with his earlier statements and each time this was brought to his attention, he responded that AIG Cunningham and I were confused and did not understand the issues.

Mr. Castillo then identified the below additional reasons he believed the Asbestos Workers Local 12 Funds investigation was and is being stalled by EBSA managers, SOL employees and other representatives:

- Regional Director Kay separated the case into two parts, when one report of interview (ROI) could have been written in 2006, delaying Part 2 of the investigation.

- Regional Director Kay and Mr. Goldberg directed him to keep meeting with the Asbestos Workers Local 12 Union trustees despite the fact that the union never produced documents to disprove his (Castillo's) investigative findings.

- Regional Director Kay, Mr. Goldberg and Ms. Weekley always disagreed with his investigative findings.

- Regional Director Kay forwarded his findings to SOL too late, causing the statute of limitations to run out.

According to Mr. Castillo, Mr. Goldberg finally reviewed the documents pertaining to the Asbestos Workers Local 12 Funds investigation when Mr. Castillo was preparing the ROI for Part 2 of the investigation. Mr. Goldberg disagreed with Mr. Castillo and believed a shortfall existed in the Asbestos Workers Local 12 Annuity Fund, when Mr. Castillo believed there was no shortfall. Mr. Castillo claims that Mr. Goldberg never produced any documents to support his belief that there was not a shortfall.

On November 19, 2008, Mr. Castillo obtained a statement of the Asbestos Workers Local 112 Union Annuity Fund from New York Life and a bank statement of this fund, both of which, according to Mr. Castillo fail to show a shortfall exists within the Annuity Fund. Mr. Castillo indicated he has e-mailed this information to Mr. Goldberg to support his investigative findings and as of this date, has not received a reply from Mr. Goldberg.

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Mr. Castillo stated he reviewed documents provided by the Asbestos Workers Local 12 Union trustees on November 20, 2008, identifying a bank deposit into the Asbestos Workers Local 12 Annuity Fund from employer contributions, which the union trustees claimed prove that union employers made all of the required contributions to the Annuity Fund. It is Mr. Castillo's opinion that the documents fail to show the full amount of the required employer contributions into the Annuity Fund account and asserts the documents provided were the same documents the union trustees had previously provided to him.

Mr. Castillo advised he received information from Mr. and Mr. , Asbestos Workers Local !2 Annuity Fund participants on December 3, 2008, that data used for the Annuity Fund's interest allocation analysis by the unions accounting firm of Schultheis and Panettieri were incorrect. After reviewing this information, Mr. Castillo came to the conclusion that Mr. and Mr. were correct and on December 30, 2008, presented this information to Regional Director Kay and Mr. Goldberg. Mr. Castillo related that both Regional Director Kay and Mr. Goldberg agreed with him and advised him to contact the Asbestos Workers Local 12 Union trustees to obtain additional documents. As of this date, Mr. Castillo reported the documents supplied by the union trustees are the same documents previously presented and fail to validate the union trustee's claims.

On December 4, 2008, Mr. Castillo met with Regional Director Kay and Mr. Goldberg to review the documents provided by the Asbestos Workers Local 12 Union trustees on November 20, 2008. Mr. Castillo provided the following statements regarding this meeting:

- Regional Director Kay disagreed with his claim that the documents were not complete.
- He told Regional Director Kay that he sounded like a defense attorney.
- Regional Director Kay got mad at him and "pointed his finger" at him.
- He and Regional Director Kay continued arguing over the issue of whether or not loans receivable are plan assets. Regional Director Kay argued that loans receivable should not be considered plan assets.
- He believes that Regional Director Kay really doesn't understand the accounting practices or he is just "bullying" him.

Mr. Castillo stated he began communicating with Scott Albert, Chief, Division of Reporting Compliance, Office of the Chief Accountant (OCA), EBSA, DOL,

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Washington, DC, after Regional Director Kay had requested OCA to provide an interpretation on two of the four issues in Part 2 of the Asbestos Workers Local 12 Funds investigation:

- $381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the fund participants.

- The Asbestos Workers Local 12 Annuity Fund's earnings for calendar year (CY) 2000 (totaling approximately $1.8 million) were not allocated to individual participant accounts, even though the Annuity Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations.

According to Mr. Castillo, EBSA is still waiting on the analysis by OCA of the above issues.

At the conclusion of the interview, Mr. Castillo was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

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# 15

Dave:

NYRSOL has added three other questions as follows:

1. Where a Taft-Hartley Annuity Plan has experienced a substantial loss due to theft, which loss has yet to be quantified by forensic audit, is it imprudent for Trustees to refrain from allocating one year's investment earnings (totaling $1.8 million where the plan has assets totaling some $45 million), to cover plan expenses and the other potential effects of the loss, until the loss has been quantified?

1A. Does the conclusion change if the plan has approximately $2.5 million in unallocated surplus assets in addition to the $1.8 million?

2. How much money in unallocated assets (contributions, earnings, forfeitures), may a Taft-Hartley annuity plan maintain without violating IRC or ERISA?

Your views would be appreciated.

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**From:** Kay, Jonathan - EBSA
**Sent:** Friday, April 04, 2008 4:59 PM
**To:** Lurie, David - EBSA
**Cc:** Monhart, Jeff - EBSA
**Subject:** Local 12 Asbestos Workers Annuity Fund

Dave:

I would appreciate your thoughts on the following situation.

e above-referenced multiemployer, defined contribution plan is funded by contributions from employers. ould 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? Would the answer be different if the allocation was considered temporary, i.e. until such time that the trustees implemented their collection procedures? 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. Thanks.

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

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## Kay, Jonathan - EBSA

| | |
|---|---|
| **From:** | Lurie, David - EBSA |
| **Sent:** | Wednesday, April 09, 2008 9:10 AM |
| **To:** | Kay, Jonathan - EBSA |
| **Cc:** | Monhart, Jeff - EBSA; Kade, Dennis - SOL; Weekley, Jennifer - SOL; Goldberg, Robert - EBSA |
| **Subject:** | RE: Local 12 Asbestos Workers Annuity Fund |

Jon,
In response to your first question, my thinking is that it would first depend on the terms of the plan. If the plan addresses the issue (either saying that participants are entitled to benefits only to the extent that their employer makes the contributions it is obligated to make, or, conversely, that participants are entitled to specified benefits regardless of whether the employer makes it's required contributions), that would likely be controlling. In that case, if the plan states that participants are entitled to benefits only to the extent that the employer makes it's required contribution, it would appear to be in violation of the plan document, and section 404(a)(1)(D), to allocate amounts in the forfeiture account or earnings to the accounts of affected participants. Conversely, if the plan provides that participants are entitled to specified benefits regardless of whether the employer makes its required contributions, the trustees are probably *obligated* to allocate assets such as the forfeiture account and earnings on investments to the accounts of participants whose employer has not made its contribution. If the plan eventually is able to collect the delinquent contribution, either in whole or in part, that money presumably should be allocated to the accounts of those participants that would have received the prior allocations but for the delinquency.

If, on the other hand, the plan is silent on that issue, it may still be prudent for the trustees to allocate such assets to the accounts of the affected participants, but it may require a balancing of the effect of the allocation on the affected participants versus the effect on the rest of the participants. Certainly, to the extent that the forfeitures, earnings or other employer contributions being allocated can be associated with the affected participants, that would tip the balance more toward it being a prudent decision. And if it is considered a temporary situation, pending implementation of the plan's collection procedures, assuming that the trustees can determine a reasonable likelihood of successs, I would think that would also be a factor in the prudence column.

As to the NYRSOL questions -
1. I think it would be difficult to say that the trustees are being imprudent in such a situation. (I am assuming this is also a DC plan) Just as investment losses have to be offset against investment gains before investment results can be allocated to participant accounts, losses due to other reasons, such as theft, have to be offset against earnings before such amounts can be allocated to participant accounts. If the plan is a DB plan, I still think an imprudence case would be difficult, since the trustees need to make sure that they have sufficient resources to pay the plan's administrative expenses. Until they know the magnitude of the loss, it may in fact be imprudent to allocate the earnings if there is a chance that they will come up short in other areas.

2. I don't think so. Perhaps if it is clear from the facts that, regardless of the magnitude of the loss, the plan will have sufficient unallocated assets to meet its obligations, there could be an argument that it is imprudent not to allocate the earnings. But that seems an unlikely set of facts.

3. I don't think there's a hard and fast answer to that, at least under Title I, although I'm not aware of any thing under the Code that would impose a limit. I think that it's a prudence call, based on the facts and circumstances of the particular plan in question. And it probably also will depend on whether the plan is a DB or DC plan.

Hope this helps. Let me know if you need anything more.

*David Lurie*
*Senior Pension Law Specialist*
*Office of Regulations and Interpretations*

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| | |
|---|---|
| **From:** | Kay, Jonathan - EBSA |
| **Sent:** | Monday, April 07, 2008 3:11 PM |
| **To:** | Lurie, David - EBSA |
| **Cc:** | Monhart, Jeff - EBSA; Kade, Dennis - SOL; Weekley, Jennifer - SOL; Goldberg, Robert - EBSA |
| **Subject:** | FW: Local 12 Asbestos Workers Annuity Fund |

16

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.

## Wyche, Robert - OIG

**om:** Castillo, Jose - EBSA
**ent:** 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.

d, 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
Fax: 212-607-8689

>
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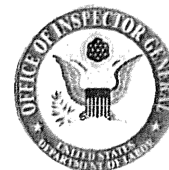
17

# Report of Interview

## U.S. Department of Labor
## Office of Inspector General



OIG Form 103 (OI-6/08)

| Interview Date: | February 12, 2009 | Location: | 201 Varick Street, New York, NY | Case Number: | 14-2601-0004 IA |
|---|---|---|---|---|---|
| Subject: | Jennifer Weekley and Dennis Kade | Prepared By: | Robert W. Wyche RW | Date Prepared: | February 18, 2009 |

On February 12, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Jennifer Weekley, Attorney and Dennis Kade, Attorney, Office of the Solicitor (SOL), Employee Benefits Security Administration (EBSA), New York Regional Office (RO), United States Department of Labor (DOL), 201 Varick Street, Suite 983,New York, New York. Prior to the interview, AIG Cunningham and I identified ourselves and obtained the following personal information:

Name: Jennifer D. Weekley
DOB:
Home Address:

Work Telephone:
Title:
EOD:
Years in Current Position

Name: Dennis K. Kade
DOB:
Home Address:

Home Telephone:
Work Telephone:
Title:
EOD:
Years in Current Position

Ms. Weekley and Mr. Kade were given a Garity warning at the onset of the interview,

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which they read and signed, agreeing to answer questions in this investigation. When questioned about the Asbestos Workers Local 12 Funds investigation, Mr. Kade advised that the investigation had been separated into two parts; for the purpose of separating the simpler issues of Part I to expedite litigation, while the more complex issues involved in Part II of the investigation could be further investigated and reviewed. According to Mr. Kade, the Asbestos Workers Local 12 Funds investigation was referred to SOL by EBSA sometime in July or August 2007 and was assigned to Ms. Weekley.

Ms. Weekley stated that her initial action in this investigation was to establish tolling agreements with the Asbestos Workers Local 12 Union trustees to have them waive the statute of limitations, while the government completes its investigation. According to Ms. Weekley, this process is usually a formality due to the fact that the union could be sued to obtain an extension, therefore the union usually consents to a tolling agreement.

Ms. Weekley stated the next steps in her involvement with the investigation were to prepare a statute of limitations analysis and complete a merits analysis and draft complaint. Ms. Weekley stated the statute of limitations analysis was completed by September or October 2007 and the merits analysis and draft complaint was completed in December 2007. According to Ms. Weekley, there were five investigative issues involved in the Asbestos Workers Local 12 Funds investigation:

1. Improper payment by the Asbestos Workers Local 12 funds to Asbestos Workers Local 12 Union for insufficiently documented collection services performed by the Asbestos Workers Local 12 full-time business manager.

2. Improper payment by the Asbestos Workers Local 12 Pension, Welfare, Annuity, Vacation and Educational funds of the proportionate audit and legal fees of the Asbestos Workers Local 12 Union general fund and the joint Industry Promotion fund.

3. Payment of $39,000 to accountants Schultheis and Panettieri for allegedly insufficiently documented investment tracking analysis services.

4. Payment of $31,000 for accounting services with allegedly insufficient documentation of services rendered.

5. Payment of post-audit accounting services invoice with allegedly insufficient documentation.

Mr. Kade advised that the tolling agreements for the Asbestos Workers Local 12

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Funds investigation for both Part I and Part II of the investigation had originally been completed by Ms. Weekley in December 2007. Mr. Kade stated that Regional Solicitor Patricia Rodenhausen, SOL, New York Region, DOL, wanted SOL to address the cases as they were referred to their office and not as one matter. As a result of this, negotiations proceded with Part I of the Asbestos Workers Local 12 Funds investigation.

Ms. Weekley stated that after several months of negotiation, the Asbestos Workers Local 12 Union agreed to terms of a settlement for issues identified in Part I of the investigation in March or April 2008. The agreed settlement was for $172,000 in restitution to the Asbestos Workers Local 12 Union Funds with an additional ten percent added penalty.

Both Ms. Weekley and Mr. Kade stated that EBSA, to include Jonathan Kay, Regional Director, EBSA New York Region, Robert Goldberg, Group Supervisor, EBSA, New York Region (Mr. Castillo's direct supervisor), and Jose Castillo, Investigator, EBSA, New York Region, were apprised of and were included in all settlement related discussions and negotiations. Ms. Weekley added she was never met with any resistance from Mr. Castillo during the settlement process for Part I of the Asbestos Workers Local 12 Funds investigation and was told by Mr. Castillo that he was fine with the settlement because the most important part of the investigation is Part II.

Ms. Weekley stated that she received Mr. Castillo's report of interview (ROI) for Part II of the Asbestos Workers Local 12 Funds investigation in December 2007 and began work on it in January 2008, after obtaining tolling agreements for Part I and Part II. According to Weekley, the ROI for Part II was lengthy and contained approximately 100 exhibits of documentary evidence. Ms. Weekley described Part II of the Asbestos Workers Local 12 Funds investigation as containing very complex accounting issues, which were not clear cut. Ms. Weekley identified the following four issues involved in Part II of the Asbestos Workers Local 12 Funds investigation:

1. Alleged failure of the trustees to allocate to participant accounts $381,000 in year 2000 Annuity Fund earnings.

2. Alleged failure of the trustees to allocate to participant accounts approximately $1.9 million in year 2000 Annuity Fund earnings.

3. Alleged use of fund assets to augment employer contributions.

4. Unexplained transfer of monies from the Welfare Fund to the Annuity Fund.

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Ms. Weekley advised the Asbestos Workers Local 12 Union trustees admitted discovering a discrepancy between the participants annuity account and the Asbestos Workers Local 12 Union trust account after union participants voted to adapt a union participant directed investment option referred to as "going live." In addition, the insufficient assets also existed due to a theft scheme involving several union trustees. Asbestos Workers Local 12 Union trustees further acknowledged that plan year 2000 earnings were not allocated, stating the earnings could not be allocated because of insufficient assets caused by the theft and assets needed to fund the go live option. The theft incident was settled in a law suite in 2004 in which $1.8 million was recovered and applied to the Annuity Fund by the trustees to fund the go live investment option.

According to Ms. Weekley and Mr. Kade, SOL had reservations as to whether or not the above actions involving the allocation of the $1.8 million could be considered a violation. Ms. Weekley stated after reviewing the ROI and exhibits, she had several meetings with Mr. Castillo and Mr. Goldberg to discuss the issues of Part II of the Asbestos Workers Local 12 Fund investigation. It was during these meetings that Mr. Castillo started to become agitated and confrontational when Ms. Weekley and others at SOL questioned his investigative theories. Mr. Castillo believed that the loans receivable should be counted as part of the plans' assets (available for benefits) and that the Asbestos Workers Local 12 Union Trustees had sufficient monies to cover fund losses and implement the go live option and should have redirected monies to the funds participants. Mr. Castillo further claimed that his investigation confirmed that fund earnings were not distributed among the union participants.

Ms. Weekley stated that Mr. Castillo continuously claimed that no one has been able to produce documents to dispute his findings or support the union trustees' claims. Ms. Weekley reported Mr. Castillo accused Asbestos Workers Local 12 Union trustees and accountants of committing accounting fraud and "spinning the investigation." Mr. Castillo also referred to these individuals as "high priced lawyers and accountants covering up a fraud."

Mr. Kade and Ms. Weekley specified that due to the complex issues involved in Part II of the Asbestos Workers Local 12 Union Fund investigation, SOL decided to solicit the assistance of the Office of Regulation and Interpretation, DOL, for their analysis and opinion of the investigative issues. Ms. Weekley stated the Office of Regulation rendered an opinion that union trustees are entitled to override the plan document, which directs them to distribute money earnings back to the investors. In this case, the Asbestos Workers Local 12 Union trustees used earnings to fund the "go live" option and therefore, in the opinion of the Office of Regulation, the accounting actions could be legal.

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Ms. Weekley reported that EBSA had also sought outside opinion regarding Mr. Castillo's investigative findings and contacted the Office of the Chief Accountant, DOL to review and interpret the issues. Ms. Weekley explained that Mr. Castillo's main argument was that the participant account balances contained more money than actual assets in the trust account and that this money should have been returned to the plan participants. Ms. Weekley pointed out that one flaw in Mr. Castillo's findings was that his information was obtained from a "snapshot" of the union accounts, which would naturally show an imbalance of funds. Ms. Weekley also feels Mr. Castillo is in error in his assertion that participant loans should be included as plan assets.

Mr. Castillo, according to Ms. Weekley became increasingly combative in the spring of 2008, during meetings and telephone conversations regarding discussions of his investigative findings in Part II of the Asbestos Workers Local 12 Fund investigation. Mr. Castillo would constantly use words like "spin" and "fraud" to describe the actions of others offering alternate views of his investigative findings. Ms. Weekley advised Mr. Castillo began sending belligerent e-mails to her and others involved in the investigation accusing them of improper conduct in the the Asbestos Workers Local 12 Fund investigation. As a result of these actions, Regional Solicitor Rodenhausen notified Regional Director Kay that Mr. Castillo would not be allowed to attend any further meetings at SOL relating to the Asbestos Workers Local 12 Funds investigation.

Ms. Weekley advised that the Asbestos Workers Local 12 Fund investigation is presently ongoing pending further analysis of the accounting issues and further information from the Asbestos Workers Local 12 Union Trustees regarding these specific issues. Once an agreement is reached as to the legality of the Asbestos Workers Local 12 Union's accounting issues, and if any violations exist, SOL will continue with the settlement process or civil action.

According to Ms. Weekley, Mr. Castillo is still involved in the Asbestos Workers Local 12 Fund investigation and has been kept informed of all meetings and developments relative to the case. Ms. Weekley further indicated that Mr. Castillo was present at a December 2008 meeting with a representative from OCA and participated in this meeting with a presentation of his investigative findings. Ms. Weekley, under the direction of Regional Solicitor Rodenhausen does not communicate directly with Mr. Castillo. Any information needed to go to or from Mr. Castillo is done through his supervisor, Mr. Goldberg.

Both Mr. Kade and Ms. Weekley denied any claims that they or SOL has or attempted to impede or hinder the Asbestos Workers Local 12 Fund investigation. Mr. Kade suggested that the Asbestos Workers Local 12 Fund investigation was actually expedited by SOL at EBSA's request.

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When questioned about their relationship with Sherwin Kaplan, Attorney, Thelen, Reid, Brown, Raysman and Steiner (attorney representing the accounting firm of Schultheis and Panettieri), Ms. Weekley stated she has never met or spoken to Mr. Kaplan. Mr. Kade stated that he knew Mr. Kaplan briefly when he was employed with EBSA, DOL in Washington, DC, but has not had a personal relationship with him and has not spoken with him in years. Mr. Kade added that Mr. Kaplan has been in private practice for approximately ten years.

When questioned about their relationship with or contact with , Ms. Weekley advised that she knows the name only through her conversations with the Asbestos Workers Local 12 Union's attorney, who describes Mr. as a frequent complainer of fund and union matters. Mr. Kade also indicated he has never had any contact with Mr. .

At the conclusion of the interview, Mr. Kade and Ms. Weekley were asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

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## AFFIDAVIT

City: New York, NY Date: 3/10/09

State: ______ Time: 11:20am

Jennifer D. Weekley, being duly sworn, deposes and states:

JDW 3/10/09

Case Number: 14-2601-0004 IA Page 1 of 9 Deponent's Initials

OIG 118A (OLRFI 9/05)

On February 11, 2009, beginning at approximately 1:50 pm, Dennis Kade and Jennifer Weekley met jointly with representatives of the Washington Office of Inspector General including Assistant Special Agent-in-Charge Robert Wyche and his supervisor Assistant Inspector General Gene Cunningham. The interview took approximately two hours. ASAIC Wyche stated that they had been referred the Local 12 matter from the Office of Special Counsel and former Sen. Hillary Clinton's office to investigate. They said that Jose Castillo of EBSA made allegations that the investigation had been improperly delayed by EBSA and/or the Solicitor's Office and that the statute of limitations had been allowed to expire, and that EBSA had obstructed his efforts to investigate the case. They said that they had not yet interviewed Castillo. At the beginning of the interview, Kade and Weekley were asked to execute acknowledgements that we had been advised of our Garrity rights. After consultation with Deputy Regional Solicitor Mark Holbert (and Deputy Solicitor Ronald Whiting by telephone), both did so.

Timeline of Solicitor's Office Work

Local 12 "Part I"

Dennis Kade explained that the Local 12 case came to the Solicitor's Office without any pre-referral work by attorneys. Jennifer Weekley explained that the case first came to her in or about late summer of 2007. She stated that only the issues in "Part I" of the case were referred at that time. (D. Kade stated that his impression from EBSA was that the case was aging and EBSA wanted it processed expeditiously, and accordingly had separated the simpler issues into "Part I" the case and referred them for litigation, while the more complex issues, which needed further development, were reserved for "Part II.") J. Weekley stated that the issues in "Part I" did not include the failure of the Local 12 Annuity Fund Trustees to allocate approximately $2 million in year 2000 plan earnings. That issue was reserved for "Part II." The issues referred by EBSA in Local 12 Part I were: 1) improper payment by Local 12 Funds to Local Union 12 for insufficiently documented, collection services performed by Local 12's apparently full-time business manager; 2) improper payment by Local 12 Pension, Welfare, Annuity, Vacation and Educational Funds of the proportionate audit and legal fees of the Local 12 Union General Fund and the Joint Industry Promotion Fund; 3) payment of $39,000 to accountants Schultheis and Panettieri for allegedly insufficiently documented investment tracking analysis services; 4) payment of $31,000 accounting services invoice with allegedly insufficient documentation of services rendered; and 5) payment of post-audit accounting services invoice with allegedly insufficient documentation. The Trustees' attorneys contended that there was no violation on issue #1 because the business manager was not full time and the services were in fact performed even if imperfectly documented; on issue #2 the Trustees conceded liability; on issue #3 the services were performed and were valuable to the Funds; on issue #4 the documentation supporting the invoice was supplied as soon as requested by a Trustee; and on issue #5 the services were performed and were valuable to the Funds.

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Jennifer Weekley stated that after the Statute of Limitations analysis was completed, probably by October or November of 2007, she completed the merits analysis and draft complaint. Those documents were finalized and sent to the Justice Department for authorization to sue on an expedited basis. Justice Department authorization was obtained and a meeting was held with the Trustees of the Local 12 Funds in December or January of 2007 to discuss the findings and attempt to settle the case before filing suit, as required by the Executive Order issued in the first Bush Administration. Representatives of EBSA including Robert Goldberg and Jose Castillo were present at that meeting.

D. Kade pointed out that Tolling Agreements in both Part I and Part II of the Local 12 case were obtained by J. Weekley in advance of the 2007 Christmas holidays. The Regional Solicitor determined that the cases should be dealt with as they came into the office, not as one matter. Accordingly, negotiations proceeded with respect to Part I of the case. EBSA representatives including Robert Goldberg and Jose Castillo were apprised of and included in all settlement negotiations and deliberations, J. Weekley informed the OIG Inspectors.

J. Weekley stated that by approximately January 2008, the Solicitor's Office had received a settlement offer in Part I of the matter; by approximately February or March 2008, the Solicitor's Office extended a counteroffer in the case; by approximately March or April, 2008, the terms of settlement had been agreed to by both sides. Documents were prepared and signed shortly .ereafter, and the restitution agreed on was paid and confirmed by approximately July 2008. J. Weekley stated that the settlement was for $172,000 in restitution to the Funds (a portion attributable to each violation alleged) and a 10% ERISA Section 502(l) penalty (reduced because of litigation risk). J. Weekley stated that all personnel at EBSA agreed that the settlement was appropriate and reasonable, including Castillo. Specifically, J. Weekley stated that J. Castillo stated to her in a telephone call at the time that the agreement in Part I seemed fine, especially because the valuable part of the case was Part II.

Local 12 "Part II"

J. Weekley stated that the ROI in Local 12 "Part II" was received by the Solicitor's Office in December 2007. J. Weekley recalled that she might have reviewed it in December, but began working in earnest on the file in January 2008. (After a meeting was held with the Trustees' counsel, the first priority in December was getting appropriate tolling agreements for "Part I" and "Part II" in place.) At the same time, J. Weekley related, she was working on the prosecution/depositions in the Local 1175 case (which settled after a mediation on March 5, 2008), and on negotiating a settlement in the Plastomatics ESOP matter, which settled in approximately February to March 2008 for $3.5 million. Nevertheless, J. Weekley related that we treated Local 12 "Part II" as a priority and J. Weekley began to review the file, which had a lengthy ROI and some 100 green file exhibits of documentary evidence.

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of the Trustees to allocate to participant accounts approximately $1.9 million in year 2000 Annuity Fund earnings; 3) alleged use of Fund assets to augment employer contributions; 4) unexplained transfer of monies from the Welfare Fund to the Annuity Fund. The Trustees have denied any liability on any of the claims and, while acknowledging that the plan year 2000 earnings were not allocated, have stated that it was necessary to refrain from allocating those earnings because there were insufficient assets (due to an ongoing theft scheme in the 1990s) to cover the existing participant account balances. J. Weekley explained the Trustees' contention that they needed all available cash in order to implement a participant-directed investment platform for the 401(k) investments (to "go live"). J. Weekley stated that the Trustees subsequently quantified their losses and sued the responsible parties; in 2004, the Trustees recovered approximately $1.8 million on their claims, of which some $1.3 million was distributed to the participants.

J. Weekley stated that after reviewing the ROI and exhibits, she had approximately two meetings with R. Goldberg and J. Castillo at EBSA where she posed questions about the case and the documentary evidence. She stated that at these meetings, Castillo seemed unable to grasp or accept the Trustees' claim that the litigation recovery was allocated in lieu of the 2000 earnings which were withheld because of a shortfall in assets. She stated that J. Castillo rejected the Trustees' claim that the Funds had experienced a loss due to theft because counsel had "not showed me the documents;" he rejected the claim that the Funds were short because he believed that loans receivable must be counted as part of the plans assets "available for benefits" because that's what the accounting rules state; and even if the loans are not counted, the Trustees had fficient monies to cover the losses and implement a self-directed investment platform, he aimed. J. Weekley stated that when questioned about the problem of corresponding time periods for the remittance reports and bank account deposits he stated that all of the Trustees' explanations are "spin" and "accounting fraud" and high priced lawyers and accountants complicit in covering up a fraud.

J. Weekley explained to Insps. Wyche and Cunninham the progress we had made to date—two statute of limitations analyses completed by Spring of 2008 and a draft merits analysis completed in or about May 2008. J. Weekley stated that we had not made any final conclusions about the merits of the case but were still analyzing the issues and gathering additional documentary evidence, and that EBSA has sought assistance from the DOL Office of the Chief Accountant in analyzing the evidence and eliciting additional documentary evidence; and we are operating under an extending tolling agreement through March 09.

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With respect to Castillo's motivations/sensitivities with respect to this particular case, Jennifer Weekley stated that she was vaguely aware that he might have some personnel issues, and that he might have been criticized with respect to his handling of this case, which perhaps made him especially sensitive about it. She stated that she tries her best not to know anything about his personnel issues or anyone else's and that she could not recall how she knew about his possible ues. Dennis Kade stated that Castillo had been turned down repeatedly for promotion at EBSA.



gpw 3/10/09

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Dennis Kade stressed that EBSA had pushed to have the case moved expeditiously because it was aging.

Sherwin Kaplan

sp. Wyche asked whether we had or knew of any relationship anyone else on the case had with Sherwin Kaplan. Dennis Kade stated that Mr. Kaplan represented Schulteis and Panettieri in early meetings on the case and that he was a former Department of Labor attorney who was now in private practice, like many others. Dennis Kade stated that he knew Mr. Kaplan very briefly as a fellow DOL employee many years ago in Washington, but had no personal relationship with Mr. Kaplan and has not spoken to him in years. Mr. Kaplan has been in private practice for at least 10 years. J. Weekley stated that she has never met or spoken to Mr. Kaplan and knows his name only as a former DOL ERISA attorney in private practice.

J. Weekley stated that her understanding, from conversations with the Funds' attorney, is that Mr. is a gadfly, who frequently complains about Fund matters and Union matters. J. Weekley stated that her understanding is that Mr. believes he is entitled to a share of the year 2000 plan earnings as well as the $1.3 million litigation recovery and does not believe he should share in the plan losses suffered through the theft in the 1990s, in part because he claims the Trustees did not properly disclose the plan's losses through theft.

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Weekley stated that the Trustees had included a footnote about potential theft losses in their nancial statements for the 2000 or 2001 plan year; in addition, the Trustees had made full



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disclosure with a power point presentation and questions and answers with the accountants and other service providers in 2004, when the litigation proceeds were recovered. J. Weekley stated that she was uncertain what other disclosure efforts had been made by the Trustees between those dates, but that the file appears to lack evidence of affirmative attempts to disguise the losses or to mislead the participants.

Castillo's Current Status on Case

Jennifer Weekley stated that as far as she knew, J. Castillo was still involved at EBSA in the investigation of the case, that it seems to her that EBSA was informing him of all steps in the case as they occurred. For example, when we sent out our document request in August or September of 2008, the Solicitor's Office was delayed so that EBSA could have J. Castillo review it and add his comments. J. Weekley stated that when we had a meeting with a representative of OCA in December, Mr. Castillo participated in the meeting and was asked to present his views, which he did.

J. Weekley stated that, on the direction of the Regional Solicitor, she is not responding directly to communications from J. Castillo, but that all communications go through supervisor R. Goldberg and Regional Director J. Kay. J. Weekley stated that she received these instructions from the Regional Solicitor in the spring of 2008, after J. Castillo began to transmit a series of misleading e-mails with respect to the case. In addition, it seems to be standard policy that all important communications with EBSA investigators by attorneys in any case go through supervisors at EBSA.

J. Weekley stated that the trigger date for Mr. Castillo's e-mails referencing the Solicitor's Office seems+ to have been a conference call among J. Kay, R. Goldberg, J. Castillo and D. Kade and Jennifer Weekley in or about April 2008, in which the Solicitor's Office was attempting to complete its initial analysis of the case and wanted to pose several questions about the facts and the merits of the case. J. Weekley stated that these include, for example, whether the Fund could prudently temporarily advance assets to cover delinquent employer contributions, and pay the Fund back later when the contributions came in, and whether when Trustees are facing a shortfall that has yet to be quantified, it may be prudent to decline to allocate earnings. J. Castillo was mostly silent as we questioned certain conclusions in the ROI.

J. Weekley stated that J. Castillo was not included in approximately one meeting on the case held with opposing counsel by the Solicitor's Office; R. Goldberg was the EBSA representative at that meeting. J. Weekley stated that J. Castillo was not included in the meeting because the Regional Solicitor wanted to have a tone of cooperation at the meetings so that the remaining factual issues could be resolved. EBSA has informed us that J. Castillo was disruptive in earlier meetings with the Trustees and their counsel and caused umbrage and lack of cooperation by directly accusing the Trustees and their accountants of being crooked.



JPW 2/10/09

ORI Inquiry

J. Weekley stated that J. Castillo had made unfounded claims set forth in e-mails that J. Kay attempted to apply to EBSA's Office of Exemption Determinations for a prohibited transaction exemption for some alleged violation in this matter. J. Weekley stated that what actually happened was that EBSA and the Solicitor's Office had sought an informal opinion from EBSA's Office of Regulation Interpretation (not the Office of Exemption Determinations), about certain difficult issues in the case. Specifically, the questions referred to ORI included: 1) Where a Taft-Hartley Annuity Plan has experienced a substantial loss due to theft, which loss has yet to be quantified by forensic audit, is it imprudent for Trustees to refrain from allocating on year's investment earnings (totaling $1.8 million where the plan has assets totaling some $45 million), to cover plan expenses and other potential effects of the loss, until the loss has been quantified? (ORI opined that it would be difficult to conclude that this was imprudent); 2) Does the conclusion change if the plan has approximately $2.5 million in unallocated surplus assets in addition to the $1.8 million? (ORI opined "I don't think so"); 3) How much money in unallocated assets (contributions, earnings, forfeitures) may a Taft-Hartley Annuity plan maintain without violating ERISA or the IRC? (ORI opined that this is a prudence call without a hard and fast rule.) Jennifer Weekley stated that such informal advice is sought frequently during the course of case development and that it was not unusual in this case.

Castillo Claims J. Weekley told him to ignore plan document

Castillo apparently claimed that during a telephone conference call Jennifer Weekley told him to ignore the terms of the plan document with respect to allocation of plan earnings. J. Weekley stated that she has no recollection of telling him that, but does recall explaining that in certain circumstances, Trustees have a duty to override the terms of a plan document when complying with them would violate other fiduciary duties. For example, she stated, when an ESOP plan document provides for 100% investment in employer stock, and the fiduciaries know the company is about to fail, it may not be prudent to remain in the employer stock and they may have a duty to override that particular term of a plan document. J. Weekley stated that this is a point she made in the April 2008 conference call between EBSA and SOL in exploring the theories of the case before drafting a merits analysis—whether it might have been prudent for the Trustees to withhold the year 2000 earnings until the theft losses had been quantified.

Castillo Sought Advice

J. Weekley stated that over a year ago, when she and Mr. Castillo were working on another case, he mentioned to her that he was working on another big case with millions of dollars in plan losses and that he was seeing that the plan administrator was supplementing employer contributions with plan earnings and indicated that he didn't know what could be going on. Ill advisedly, she stated, she suggested that he might want to look at whether the employers were making the contributions that they owed to the plan and that he should probably start with [e]mployers controlled with the Trustees. She stated that it seems that late in the investigation, he did this, possibly after speaking with her. Late in the investigation, she stated, J. Castillo began



JPW 3/10/09

.o espouse a theory that the failure to allocate the 2000 earnings was part of a larger scheme in which the Trustees were covering for a deliberate shortage of employer contributions.

OCA

J. Weekley stated that EBSA has enlisted the assistance of expert accountants in DOL's Office of the Chief Accountant to assist in the analysis of this case; chiefly, OCA is currently examining the question of whether there was a shortfall in plan assets to cover the existing participant account balances at the time the Trustees made the decision to "go live" with the participant directed investment platform. J. Weekley stated that OCA has reviewed the evidence and is preparing its report.

EBSA Is Gathering Evidence

J. Weekley stated that EBSA is gathering and/or analyzing additional evidence on the third issue respecting delinquent contributions and fourth issue involving the transfer of monies from the Welfare to the Annuity Fund. Once the review and analysis are complete, EBSA will revise its ROI if warranted and the Solicitor's Office will prepare its final analysis and recommendations with respect to the case.



JPW 3/10/09

Statement of Jennifer D. Weeks Date: 3/10/09

JDW 3/10/09

I have read this statement consisting of 9 pages. I have been given an opportunity to make corrections. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 10th day of March, 2009

Jennifer D. Weeks
Deponent's Signature

Subscribed and sworn before:

[signature]
Special Agent

3/10/09
Date

Witnessed by: [signature] Case Number: 14-260-0004 IA

Title: AIG

OIG 118C (OLRFI 9/05)

# AFFIDAVIT

City: New York Date: 4/7/09

State: NY Time: 11:20 am

Dennis K. Kade, being duly sworn, deposes and states:

DKK 4/7/09

On February 11, 2009, beginning at approximately 1:50 pm, Dennis Kade and Jennifer Weekley met jointly with representatives of the Washington Office of Inspector General including Assistant Special Agent-in-Charge Robert Wyche and his supervisor Assistant Inspector General Gene Cunningham. The interview took approximately two hours. ASAIC Wyche stated that they had been referred the Local 12 matter from the Office of Special Counsel and former Sen. Hillary Clinton's office to investigate. They said that Jose Castillo of EBSA made allegations that the investigation had been improperly delayed by EBSA and/or the Solicitor's Office and that the statute of limitations had been allowed to expire, and that EBSA had obstructed his efforts to investigate the case. They said that they had not yet interviewed Castillo. At the beginning of the interview, Kade and Weekley were asked to execute acknowledgements that we had been advised of our Garrity rights. After consultation with Deputy Regional Solicitor Mark Holbert (and Deputy Solicitor Ronald Whiting by telephone), both did so.

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disclosure with a power point presentation and questions and answers with the accountants and other service providers in 2004, when the litigation proceeds were recovered. J. Weekley stated that she was uncertain what other disclosure efforts had been made by the Trustees between those dates, but that the file appears to lack evidence of affirmative attempts to disguise the losses or to mislead the participants.

Castillo's Current Status on Case

Jennifer Weekley stated that as far as she knew, J. Castillo was still involved at EBSA in the investigation of the case, that it seems to her that EBSA was informing him of all steps in the case as they occurred. For example, when we sent out our document request in August or September of 2008, the Solicitor's Office was delayed so that EBSA could have J. Castillo review it and add his comments. J. Weekley stated that when we had a meeting with a representative of OCA in December, Mr. Castillo participated in the meeting and was asked to present his views, which he did.

J. Weekley stated that, on the direction of the Regional Solicitor, she is not responding directly to communications from J. Castillo, but that all communications go through supervisor R. Goldberg and Regional Director J. Kay. J. Weekley stated that she received these instructions from the Regional Solicitor in the spring of 2008, after J. Castillo began to transmit a series of misleading nails with respect to the case. In addition, it seems to be standard policy that all important nmunications with EBSA investigators by attorneys in any case go through supervisors at EBSA.

J. Weekley stated that the trigger date for Mr. Castillo's e-mails referencing the Solicitor's Office seems+ to have been a conference call among J. Kay, R. Goldberg, J. Castillo and D. Kade and Jennifer Weekley in or about April 2008, in which the Solicitor's Office was attempting to complete its initial analysis of the case and wanted to pose several questions about the facts and the merits of the case. J. Weekley stated that these include, for example, whether the Fund could prudently temporarily advance assets to cover delinquent employer contributions, and pay the Fund back later when the contributions came in, and whether when Trustees are facing a shortfall that has yet to be quantified, it may be prudent to decline to allocate earnings. J. Castillo was mostly silent as we questioned certain conclusions in the ROI.

J. Weekley stated that J. Castillo was not included in approximately one meeting on the case held with opposing counsel by the Solicitor's Office; R. Goldberg was the EBSA representative at that meeting. J. Weekley stated that J. Castillo was not included in the meeting because the Regional Solicitor wanted to have a tone of cooperation at the meetings so that the remaining factual issues could be resolved. EBSA has informed us that J. Castillo was disruptive in earlier meetings with the Trustees and their counsel and caused umbrage and lack of cooperation by directly accusing the Trustees and their accountants of being crooked.

ORI Inquiry

J. Weekley stated that J. Castillo had made unfounded claims set forth in e-mails that J. Kay attempted to apply to EBSA's Office of Exemption Determinations for a prohibited transaction exemption for some alleged violation in this matter. J. Weekley stated that what actually happened was that EBSA and the Solicitor's Office had sought an informal opinion from EBSA's Office of Regulation Interpretation (not the Office of Exemption Determinations), about certain difficult issues in the case. Specifically, the questions referred to ORI included: 1) Where a Taft-Hartley Annuity Plan has experienced a substantial loss due to theft, which loss has yet to be quantified by forensic audit, is it imprudent for Trustees to refrain from allocating on year's investment earnings (totaling $1.8 million where the plan has assets totaling some $45 million), to cover plan expenses and other potential effects of the loss, until the loss has been quantified? (ORI opined that it would be difficult to conclude that this was imprudent); 2) Does the conclusion change if the plan has approximately $2.5 million in unallocated surplus assets in addition to the $1.8 million? (ORI opined "I don't think so"); 3) How much money in unallocated assets (contributions, earnings, forfeitures) may a Taft-Hartley Annuity plan maintain without violating ERISA or the IRC? (ORI opined that this is a prudence call without a hard and fast rule.) Jennifer Weekley stated that such informal advice is sought frequently during the course of case development and that it was not unusual in this case.

Castillo Claims J. Weekley told him to ignore plan document

J. Castillo apparently claimed that during a telephone conference call Jennifer Weekley told him to ignore the terms of the plan document with respect to allocation of plan earnings. J. Weekley stated that she has no recollection of telling him that, but does recall explaining that in certain circumstances, Trustees have a duty to override the terms of a plan document when complying with them would violate other fiduciary duties. For example, she stated, when an ESOP plan document provides for 100% investment in employer stock, and the fiduciaries know the company is about to fail, it may not be prudent to remain in the employer stock and they may have a duty to override that particular term of a plan document. J. Weekley stated that this is a point she made in the April 2008 conference call between EBSA and SOL in exploring the theories of the case before drafting a merits analysis—whether it might have been prudent for the Trustees to withhold the year 2000 earnings until the theft losses had been quantified.

Castillo Sought Advice

J. Weekley stated that over a year ago, when she and Mr. Castillo were working on another case, he mentioned to her that he was working on another big case with millions of dollars in plan losses and that he was seeing that the plan administrator was supplementing employer contributions with plan earnings and indicated that he didn't know what could be going on. Ill advisedly, she stated, she suggested that he might want to look at whether the employers were [illegible]ing the contributions that they owed to the plan and that he should probably start with [illegible]ployers controlled with the Trustees. She stated that it seems that late in the investigation, he did this, possibly after speaking with her. Late in the investigation, she stated, J. Castillo began



[illegible]

to espouse a theory that the failure to allocate the 2000 earnings was part of a larger scheme in which the Trustees were covering for a deliberate shortage of employer contributions.

OCA

J. Weekley stated that EBSA has enlisted the assistance of expert accountants in DOL's Office of the Chief Accountant to assist in the analysis of this case; chiefly, OCA is currently examining the question of whether there was a shortfall in plan assets to cover the existing participant account balances at the time the Trustees made the decision to "go live" with the participant directed investment platform. J. Weekley stated that OCA has reviewed the evidence and is preparing its report.

EBSA Is Gathering Evidence

J. Weekley stated that EBSA is gathering and/or analyzing additional evidence on the third issue respecting delinquent contributions and fourth issue involving the transfer of monies from the Welfare to the Annuity Fund. Once the review and analysis are complete, EBSA will revise its ROI if warranted and the Solicitor's Office will prepare its final analysis and recommendations with respect to the case.



205...1619

Statement of Dennis K. Ko Date:

DKK 4/7/09

I have read this statement consisting of 9 pages. I have been given an opportunity to make corrections. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 7th day of April, 2009

Deponent's Signature

Subscribed and sworn before:

Special Agent

4/7/09

Date

Witnessed by: Case Number: 14-2601-0004 IA

Title:

OIG 118C (OLRFI 9/05)

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# Report of Interview

## U.S. Department of Labor
## Office of Inspector General

OIG Form 103 (OI-6/08)

| Interview Date: | March 4, 2009 | Location: | EBSA, OCA Suite 400 Washington, DC | Case Number: | 14-2601-0004IA |
|---|---|---|---|---|---|
| Subject: | Scott Albert | Prepared By: | Robert W. Wyche RW | Date Prepared: | March 5, 2009 |

On March 4, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Scott C. Albert, Chief, Division of Reporting Compliance, Office of the Chief Accountant (OCA), Employee Benefits Security Administration (EBSA), United States Department of Labor (DOL), 200 Constitution Avenue, NW, Suite 400, Washington, DC. Prior to the interview, AIG Cunningham and I identified ourselves and obtained the following personal information:

Name: Scott C. Albert
Home Address:

Cellular Telephone:
Work Telephone:
EOD Date:
Title:

Years in Current Position:

Mr. Albert was given a Garity warning at the onset of the interview, which he read and signed, agreeing to answer questions in this investigation. Mr. Albert was questioned as to how he became involved in the Asbestos Workers Local 12 Funds investigation and stated he had been contacted sometime in the fall of 2008 by Jonathan Kay, Regional Director, EBSA, New York Region. Regional Director Kay, told Mr. Albert that a current EBSA investigation had raised various accounting questions to include the question if participant loans could be considered plan assets. Mr. Albert's initial response to the question was that one had to determine where the plan assets are directed.

Mr. Albert advised that in December 2008, Regional Director Kay had contacted his supervisor, Ian Dingwall and requested CAO to provide assistance in interpreting several accounting issues involved with the Asbestos Workers Local 12 Funds investigation. Mr. Albert stated he was assigned to assist EBSA and traveled to the EBSA New York Region office for a meeting on December 15, 2008. This meeting, according to Mr. Albert, was to review various accounting issues identified by Jose Castillo, Investigator, EBSA, New York Region, and was attended by himself, Mr. Castillo, Regional Director Kay, Robert Goldberg,

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Group Supervisor, EBSA, New York Region, and several representatives from EBSA New York Region's Solicitor's Office (SOL).

Mr. Albert indicated that during this meeting, Mr. Castillo presented his argument that the Asbestos Workers Local 12 participant loans were improperly included in the participant account balances, which at the time represented a total of approximately $46 million. Mr. Castillo further argued that the participant loans are not only assets but are also considered investments.

Mr. Albert stated that he gave his opinion at the meeting that the Asbestos Workers Local 12 participant loans are receivable and considered an asset because the money is owed to the union, but pointed out that the assets are not readily tradable. Mr. Albert told the group that the question EBSA should be looking at is not if the participant loans are a plan asset, but how the assets are being treated in the accounting process.

Mr. Albert stated that Mr. Castillo became very agitated at his statements and complained that he (Albert) did not fully understand the investigation. Mr. Albert indicated that Mr. Castillo continued to defend his theories and findings despite the fact that he failed to produce any documentation backing up his allegation that the Asbestos Workers Local 12 Union or their accounting firm was committing fraud.

Mr. Albert reported that since this meeting he has conducted a thorough investigation into Mr. Castillo's claims that the Asbestos Workers Local 12 Union trustees and accountants failed to include loan receivables in the reported value of the funds actual assets, which was the reason why the total value was less than the total value represented in the participant's account balances.

Mr. Albert explained that he began his investigation as an impartial party, attempting to find some validity in Mr. Castillo's claims that the Asbestos Workers Local 12 Union committed fraud. According to Mr. Albert, his involvement was neither to support or disclaim Mr. Castillo's findings but to provide an interpretation of the accounting principles identified in Mr. Castillo's investigation.

Mr. Albert stated that throughout his investigation, he has been met by resistance from Mr. Castillo in providing documentation to support his findings. When requesting information from Mr. Castillo, Mr. Albert would get incomplete or unrelated data. Mr. Castillo, on numerous occasions, told Mr. Albert that his work papers back up his conclusions; however, the information he has provided to Mr. Albert fails to support this claim.

During the course of Mr. Albert's investigation, Mr. Castillo had advised him that other EBSA "Certified Public Accountants" in his office had agreed with his findings. Mr. Albert identified two of these individuals as Walter Blonski and Carmela Pagano. After contacting these

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individuals, Mr. Albert determined that Mr. Castillo had only partially explained his findings with little detail and gave them only partial information, which would result in a favorable response and lend support to Mr. Castillo's findings. When Mr. Albert confronted Mr. Blonski and Ms. Pagano with all of the facts relating to Mr. Castillo's findings, both agreed that Mr. Castillo's findings may be flawed.

Mr. Albert feels that Mr. Castillo has become obsessed with his findings and refuses to listen to any rational argument against his claims. Mr. Albert described Mr. Castillo as unprofessional and very combative during his contact with him. Over the past few weeks, Mr. Albert has received several e-mails from Mr. Castillo that he describes as rambling and often accusing Mr. Albert of providing incorrect data to disprove his (Castillo) findings. In the latest e-mail Mr. Albert received from Mr. Castillo dated March 2, 2009, Mr. Castillo accused Mr. Albert of "undermining" his investigation.

Mr. Albert advised that a draft of his official report responding to Mr. Castillo's claim that the Asbestos Workers Local 12 Union was not properly allocating the participant loans is presently being reviewed by his supervisor. Mr. Albert advised that his report will reflect that Mr. Castillo has not met the standard of proof necessary to show that the Asbestos Workers Local 12 Union committed fraud.

At the conclusion of the interview, Mr. Albert was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

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## AFFIDAVIT

City: Washington Dc Date: 4/14/09

State: Dc Time: 2:10pm

Scott C. Albert, being duly sworn, deposes and states:

4/14/09

SA

Case Number: 14-2601-0004 IA Page 1 of 2 Deponent's Initials

OIG 118A (OLRFI 9/05)

Statement from Scott Albert
Re: My Interaction with Jose Castillio

Jonathan Kay, regional director of EBSA's New York Regional Office (NYRO), asked for my assistance regarding a dispute over an investigative case between management and Jose Castillio – the investigator on the case.

The point of contention is whether the:

1) Local 12 Asbestos Workers Annuity Fund (the Plan) suffered a $1.9 shortfall as of December 31, 2000, and

2) Propriety of the Plan's Trustees to cover the shortfall – and thereby enable participants to direct the investments in their accounts - by not allocating plan earnings over participants' accounts. Joe contends there was no shortfall.

The point of the argument centered on how to consider participant loans when determining whether a shortfall exists. Jose argued that there was no shortfall because the Plan's net assets ($49.5 million, which included participant loans – exceeded the aggregate value of participants' accounts ($46.7 million). Jose's supervisors argued that participant loans should not be included in a comparison of plan assets to participant account balances because the loans are not readily tradable.

Jonathan Kay asked for my opinion on the dispute over the participant loans. He shared with me multiple documents taken from the casefile.

I visited NYRO on December 15, 2008, to get more information on the case and to meet Jose to get his side of the story. When planning the trip, I discovered Jose had contacted Marcus Aron, a senior auditor in my office, to ask whether participant loans are plan assets.

When I arrived at NYRO, I first discussed the background of the matter with Jonathan Kay, Bob Goldberg, and a couple of people from the solicitor's office. During the discussion, I suggested that, depending on whether they were included in participants' account balances, the treatment of participant loans might be irrelevant in determining whether sufficient assets existed to enable participant direction.

Whether the loans were included in the $46.7 million participant accounts became my focus for the remainder of my visit. If the 46.7 million included loans, then Jose's argument is true in that there were sufficient assets to cover the participants' accounts.

However, if the $46.7 million did not include the loans, then, depending on other factors I may had yet to discover, Jose's argument would not be true. That's because in this kind of analysis, one must compare like items.

For example, assume your checkbook shows you have $1,000 in the bank, and you have other records that show you have an IBM stock certificate in a safe deposit box worth $500. You want to write a check for $1,000. But the bank statement accurately says you only have $800 in the account. Though your net worth is $1,300, it would be inappropriate to argue your $1,000 check should clear on the basis of the cash in the bank plus the value of the IBM stock. Only by selling the stock and depositing the proceeds into the checking account will your $1,000 check clear.

This analogy describes my question over participant loans. We can only compare the $46.7 million participant account balances to net assets (investments plus participant loans) IF the $46.7 million includes the participant loans. Conversely, if the $46.7 million is supposed to reflect only investment securities allocated among participants, then participant account balances can only be compared to investment securities actually held by the plan. In this case, participant loans are disregarded.

With this issue in mind, I invited Jose to explain to me what the issue is. He explained that in their calculation of the shortfall, both the Trustees and the Plan's accountants inappropriately deducted participant loans from the asset figure to which the $46.7 million was compared. Loans are plan assets and should not have been disregarded.

When he finished, I first expressed my agreement with him that loans are plan assets. I then asked him if we should add the loan amount to the $46.6 million and compare that total to the Plan's net assets.

He responded that participant loans were not included in the $46.7 balances because that money is withdrawn from the plan and spent. So no, it should not be added to the $46.7 million. However, they should be included in the net asset amount because they are indeed assets of the Plan.

I then asked him why it was appropriate to compare the $46.7 million – which do not include participant loans – to the Plan's net assets (which include the loans).

He repeated that the loans were already deducted from the $46.7 amount and taken out of the plan. The $46.7 represents investment securities allocated to participants' accounts. Loans are not in this amount.

We went through this cyclical conversation four or five times – at first loans are not in the $46.7 million; then they are.

I asked Jose to provide me actual account statements and a summary as of December 31, 2000. This would conclusively show whether or not loans are part of the $46.7 million. He said sure, went to his desk, and came back with other documents.

What those documents were, I don't recall. But they certainly had no relevance to my request.

Jose went on to talk about the interest allocation analysis prepared by the Plan's accountants. He claimed them to be fraudulent. For one thing, the Net Income, Net Assets, and Invested Assets written in the analysis were much lower than the balances per the Plan's audited financial statements (these financial statements were audited by predecessor accounts – not the ones who prepared the analysis and performed the Plan audits beginning with the 2000 plan year.)

After my visit, Jose typed up a summary (**Exhibit 1**). In this memo, Jose explains at length why he's correct in saying loan balances are not included in the $46.7 million. But he did not address why it was appropriate to compare those balances to net plan assets – including loans.

Jose's memo also elaborates his concerns over the accountants' interest income allocation analysis.

Before I had left, I stopped into Jose's office to say goodbye. He was friendly, but did express his concern that I though participant loans should be added to the $46.7 million when comparing the account balances to the Plan's net assets. I said I'll further consider his point and will work on my report directly.

I've had little contact with NYRO on this issue until January 6, 2009, when I issued a draft report. Jonathan Kay, Bob Goldberg and I discussed it sometime later. Though they did not ask me to change any conclusions, they offered edits to simplify the report so it can be understood by the Director of the agency's Office of Enforcement.

I agreed to re-organize it, though my general approach hadn't changed.

I had little to no contact with Jose until about mid February. I contacted him to ask if he was aware of whether a particular $2.6 million inter-fund transfer made on June 19 was allocated among participant accounts (i.e., included in the $46.7 million participant account balances). He responded that it was NOT previously allocated and further explained via e-mail why he thought so (**Exhibit 2**).

I concluded I needed to look into this transfer further. If indeed this amount had not been previously allocated among participants, the plan would have actually suffered a $4 million loss – not $1.9 million.[1]

I went on to ask him again about my concern over the treatment of participant loans. His response to me wasn't in his e-mail of 2/5/2009, Jose mentioned that 2 other investigators

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[1] Jonathan Kay and Bob Goldberg later explained that the $2.5 million was a transfer of assets previously allocated (credited to) among participants' accounts (and included in the $46.7 million). Therefore, there was no need for this amount to be reallocated. In his ROI, Jose explains that this transfer was mostly composed of 2000 plan-year employer contributions. I did not see any discussion or objections of whether these contributions were credited to participants' accounts. However, in an email to me on 2/6/09 (**Exhibit 3**), Jose makes the point that the amount transferred had NOT been included in the participant account balances. For the purposes of my report, I prepared a top-side financial analysis that suggested the $2.5 million was already included in the $46.7 participant account balances.

in NYRO had "already reviewed this case more than a year ago." Jose went on to say they told him that his is "100 percent correct."

I got the names of the investigators from Jonathan Kay (who told me he got them from Jose) and called them. They told me Jose had only asked them if participant loans are considered plan assets. He did not share with the context for which he was asking. Carmella, one of the investigators, did say Jose had asked her to reconcile a single page schedule, but she could not remember what it was. It was a long time ago.

Both investigators made the point that they did not review the Local 12 case file.

I contacted Jose and asked him if he remembers what he had shown Carmella. He responded via email (**Exhibit 4**) that the document may have had nothing to do with Local 12. He did say in his email that he asked Carmella about whether loan receivables are plan assets (this is contrary to his telling me that Carmella and another investigator reviewed his Local 12 casefile).

On or about 2/20/2009, I mentioned to Jose that I was able to reconcile the amounts in the accountants' interest income allocation analysis to Forms 5500. I further explained that the audited financial statements he was trying to trace these amounts to were deficient. They did not comply with professional standards and would have been rejected by my office.

In an email that day (**Exhibit 5**), Jose questioned whether the amounts reported on Form 5500 were valid, as there was no financial information to support them.

By late February I returned with Jose to my initial question of whether participant loan balances were included in the $46.7 million.

In his email of 2/26/2009 (**Exhibit 6**) Jose again objected to my suggestion that loans should be added to the $46.7 million if you are to compare that amount to the Plan's net assets.

Jose reiterated his point that participant loans are not included in the $46.7 million. To bolster this point, Jose faxed me the last page to a participant account activity summary for the 2000 plan year (see **Exhibit 7** this is also exhibit 2.2 of my report). In his e-mail of the 26th, Jose pointed out how a new $12k loan taken out by Harry Westervelt is deducted from his account balance. He also referred to another analysis where new loans are deducted from participant accounts as well.[2]

To me this was a continuation of the conversation we had on December 15.

He went on to say in his 2/26 email that if we were to add loans to the $46.7 million, it would support the Trustees' alibi. He said that this was a theory which could not be

[2] I used this very example in my report to prove that loans were not included in the aggregate value of participant account balances of $46.7 million.

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supported by any documents. He also said that he has "all the document (sic) to prove that as of 12/31/2000 total participant account balance (sic) is $46,686,166."

I responded to Jose's email that a participant's total account is made of of investments plus loans[3]. I was thinking that Jose was questioning the logic of a participant's account equaling allocated investments plus loans (i.e., why it would be appropriate to compare the $46.7 million plus the loans to net assets – that and this was not some pie in the sky theory). (**Exhibit 8**)

Jose responded to me (same exhibit) that a loan receivable "does not play any role on the total participants account balance side. It's role is on the plan asset side." He elaborated the reasoning why a participant loan is not an asset in a participant's account.

Jose sent me another e-mail on 2/26 (**Exhibit 9**) where he clearly questions me why loan amounts "are still part of the participants (sic) account balance."

On February 27, 2009, Jose sent me an email that began with a clarification "Scott, Let's make this clear. I think I may have used an incorrect description og certain items concerning the documents."

In this email, Jose completely overturned his argument and sent me an email (**Exhibit 10**) in which he said "The $46,686,166 total participants account balance already includes the $2,756,494 loan receivable fund." He said that if I were to add the loans to the $46.7 million participant account balance when making the comparison to the Plan's net assets, I'd be double counting the loans.

The remaining conversations I had with Jose were on this point. Now I was asking him to prove that loans are included in the $46.7. (See **Exhibit 11** in which I literally beg him for proof.) I shared with Jose two documents we received from New York Life in which they confirm loans were not included in the $46.7 million. He rejected both as mere air with no substantial proof. (See **Exhibit 11**).

Incidentally, in this e-mail chain Jose told me he's including me in his complaint (page 4). Also, please note my conciliatory comments explaining that I want to find the truth.

I asked him repeatedly for participant account statements as of 12/31/2000. This would detail beyond any doubt what comprised the $46.7 million. At some point, he claimed he didn't have them because management precluded him from pursuing this further.

I do concede that it has taken me longer to finish my report than I had wanted. As chief of a civil enforcement division with a high caseload, I had numerous pressing responsibilities throughout December – March that I needed to tend to. I had no intention of delaying this matter.

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[3] The aggregate value of participants' account balances of $46.7 million only included investment securities. It was appropriate to add to that the participant loans when comparing participant accounts to Plan net assets.

Statement of Scott C. Albert Date: 4/14/09

4/14/09

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I have read this statement consisting of 7 (plus 11 Exhibits) pages. I have been given an opportunity to make corrections. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14 day of April 14, 2009

Deponent's Signature

Subscribed and sworn before:

Special Agent

4/14/09

Date

nessed by: Case Number: 14-2601-0004-IA

Title: AIC

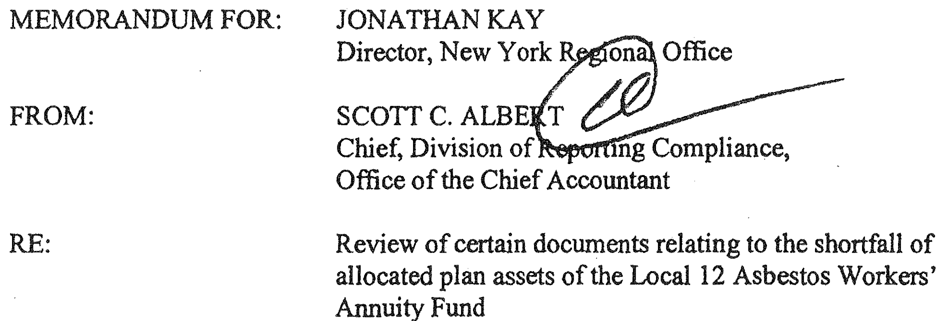
OIG 118C (OLRFI 9/05)

19

**U.S. Department of Labor**

Employee Benefits Security Administration
Washington, D.C. 20210

March 26, 2009



MEMORANDUM FOR: JONATHAN KAY
Director, New York Regional Office

FROM: SCOTT C. ALBERT
Chief, Division of Reporting Compliance,
Office of the Chief Accountant

RE: Review of certain documents relating to the shortfall of allocated plan assets of the Local 12 Asbestos Workers' Annuity Fund

As you requested, we reviewed the statements, analyses, annual reports, summaries, and other materials supporting an apparent asset shortfall relating to the above referenced plan. These documents also exhibit the actions taken by the Plan's Trustees to eliminate the shortfall.

Our observations and conclusions are presented in the report and exhibits attached herewith.

Please feel free to contact me at 202-693-8364 if you wish to discuss this further.

# A Practical Inquiry into the Existence of a $1.9 Million Shortfall Suffered by the Asbestos Workers' Annuity Fund and the Propriety of the Actions Taken by the Plan's Trustees to Eliminate It

**S. Albert**

# Summary

## Issue 1 – Whether a $1.9 Million Shortfall Existed that was Eliminated by the Non-Allocation of the $1.9 million 2000 Plan-Year Earnings

At December 31, 2000, the Asbestos Workers' Annuity Fund defined contribution plan's (the Plan) investments allocated among participant accounts were allegedly $1.9 million less than then the aggregate value of the participants' accounts. This is because of a misappropriation of plan assets by the former Fund Administrator and a series of misallocations of plan investment income among participants' accounts throughout the 1990s.[1] The Plan's Trustees discovered – though did not precisely quantify - this shortfall when in 2001 they attempted to provide participants the option of directing the investments allocated to their accounts.

For participants to exercise the investment direction option, the allocated investments had to equal the aggregate value of the participants' accounts. To resolve this, the Trustees contend they eliminated this shortfall by not crediting participants' accounts for the 2000 plan-year investment income of $1.9 million[2]. As a consequence of this accounting treatment, the participants were able to direct the investments credited to their accounts beginning on June 20, 2001.

Was not allocating the investment earnings appropriate or even necessary? First, by not allocating the investment earnings, the Trustees acted contrary to the Plan document which requires that earnings be allocated among participant accounts at the end of each plan-year. The Report of Investigation cites this as violations under sections 404 and 406 of ERISA.

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[1] The misallocation of plan earnings was quantified by Schultheis & Panettieri (CPA Firm) in September, 2001. Over the years, a number of participants whose accounts were over-credited with plan earnings may have taken distributions. Because the Trustees have not sought reimbursements from these participants, the cumulative distributed over-allocated investment income is a loss to the plan. We have not determined what adjustments, if any, the Trustees made with to accounts of participants remaining in or who had left the Plan.

[2] In addition to not allocating the 2000 plan-year investment income, on June 20, 2001, the Trustees transferred $2.5 million from an unallocated money market account of the Plan's (the "Fund Office" account) into the allocated New York Life Core Fund Trust account. The New York Regional Office believes that approximately $2.2 million of this transfer was assets that had been credited to the participants' accounts in the past. Though we have not confirmed this, the Report of Investigation did not raise a question of whether any of the $2.5 million transfer should have been credited to participants' accounts. Therefore, for the purposes of our analysis, we consider that $2.2 million of the June 2001 $2.5 million transfer was a consolidation of previously allocated assets into a single allocated fund.

Using audited financial information as of December 31, 2000, **Table 1.1** supports the contention that the $2.2 million transferred from the Fund Office account is composed of assets previously allocated among participants' accounts.

The remaining $374,000 of this transfer, as we shall explain below, is effectively an "advance payment" of the October, 2001 - $1.5 million employer contributions allocation.

By June 20, 2001, all assets allocated among participants were held in the Core Fund Trust account. These are the assets that were available for participants to direct. Consolidating all allocated investments and not crediting participants' accounts for the $1.9 million 2000 plan-year investment earnings balanced the allocated Core Fund Trust account with the aggregate value of participants' accounts. The Plan's participants were thus able to direct their investments.

Secondly, whether a shortfall existed was questioned because the Plan's net assets as of December 31, 2000, of `49.5 million (less the $1.9 million unallocated 2000 plan-year investment income[3]) exceeded the aggregate value of participants' account balances ($46.7 million) by approximately $885,000. Instead of there being a shortfall, this suggests there were sufficient assets available to allow participants to direct their investments and, consequently, the 2000 plan-year investment income could have been allocated among participants' accounts.

We were asked to review materials provided by the New York Regional Office and New York Life to determine whether both a shortfall existed and the Trustees' not allocating investment income eliminated this shortfall. (We will not comment on the technical legal issue of whether this non-allocation is an ERISA violation.) Based on our reviews, analyses, and the conclusions we reached in the sub-issues discussed below, we conclude that there was a $1.9 million shortfall as of December 31, 2000. We further conclude that the non-allocation of the 2000 plan-year's investment income eliminated this shortfall.

**Sub-Issue 1 – Whether the Value of Participant Loans were Inappropriately Disregarded in Calculation of Shortfall**

It is questioned whether the Trustees inappropriately disregarded participant loans – which are assets of the plan – when they compared net assets to the aggregate value of participants' accounts. Had they compared participant account balances with both the loans and investment securities, the Trustees would have seen that assets exceeded total participant account balances by the $885k discussed above. Consequently, participants would have been able to direct their investments and have had their accounts credited with the 2000 plan-year investment income.

Resolution

Ve conclude that it was appropriate for the Trustees to disregard participant loans when comparing the aggregate value of participants' account balances to the Plan's net assets:

1. The comparison of net assets ($49.5 million) – which includes participant loans (and $54k of other assets not allocated among participants) - to the aggregate value of participants' account balances ($46.7 million) – which does not include participant loans – is a flawed analysis.

   Only like items can be compared. The $46.7 million aggregate value of participants' account balances is a summary of investments allocated to participant's accounts. It excludes participant loans. This aggregate value, therefore, should only be compared with the Plan's allocated assets which, as of December 31, 2000, totaled $44.8 million. Hence, the shortfall is properly calculated to be $1.9 million ($44.8 million - $46.7 million).

2. To argue that participant loans should have been considered in the calculation of the shortfall incorrectly suggests that participant loans are assets readily available for participant direction.

   Though participant loans are indeed assets of the plan, they are not of the kind that can be directed by participants. Participant loans cannot be assigned or exchanged; there is no market for them and they have no intrinsic value to the world outside the plan. The only way a participant can direct the *value* of his or her loan is to convert it into an asset that is readily available for participant direction (i.e. pay the loan off).

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The 2000 plan-year investment income must be backed out of the Plan's net assets as of 12/31/2000 to make a fair comparison with .ie aggregate value of participants' account balances. Otherwise, the comparison will not demonstrate whether there were sufficient assets – other than the $1.9 million investment income - to have allowed the investment income be allocated.

Participant loans are not the type of asset that would cover a shortfall for purposes of allowing for participant direction. Therefore, when determining how much in total assets was available for participants to direct, it would have been inappropriate for the Trustees to compare total participant account balances to allocated investment securities (which were readily available for participant direction) together with participant loans (which cannot be participant directed).

**Sub-Issue 2 – Whether Differences Between the Schultheis & Panettieri Interest Allocation Analysis and Balances Reported on Audited Financial Statements Indicate that the Analysis is Unreliable**

When they became aware of a possible shortfall, the Trustees hired the accounting firm Schultheis & Panettieri (S&P) to quantify how much investment income was over-allocated among participant accounts throughout the 1990s. Using analytical procedures, S&P concluded that $1.9 million was over-allocated among participants. This net over-allocation manifested itself as the amount that participant accounts exceeded allocated plan assets (i.e., the shortfall).

The credibility of S&P's analysis was questioned, however, because the amounts labeled Net Income, Net Assets, and Invested Assets used in the analysis could not be found in the audited financial statements issued throughout the 1990s. Furthermore, we have been told that S&P's workpapers supporting this analysis were not provided to NYRO.

Resolution

We were able to match the Net Income, Net Assets, and Invested Assets for the years 1994 through 1999 to the Form 5500 Annual Reports filed for those years.[4] Though it is generally preferable to base an analysis on audited amounts, the audit reports the Plan's predecessor accountants - Lawson, Holland & Company, P.C. - and financial statements issued throughout this period complied neither with Generally Accepted Auditing Standards nor Generally Accepted Accounting Principles.

For example, the Statements of Changes of Net Assets were prepared on the cost basis of accounting. They failed to include an amount critical to any income allocation analysis: unrealized gains and losses. Additionally, many of the financial statements issued during the period failed to include required footnote disclosures.

This leaves in serious question the quality of the underlying audit work intended to support these audit reports financial statements. We conclude, therefore, that the audited financial statements issued for the years 1994 through 1999 are not a reliable basis upon which to develop an analytical review. Consequently, the fact that S&P's Interest Allocation Analysis cannot be traced to these audited financial statements is not in and of itself sufficient cause to reject its credibility.

**Sub-Issue 3 – Whether the Lack of Disclosure of Shortfall in Audited Financial Statements for 2000 and Subsequent Years Suggests there was No Shortfall**

The December 31, 2000, audited financial statements do not indicate that the Plan suffered a shortfall. Because auditors are responsible for the accuracy of the audited financial statements and accompanying notes, auditors

[4] We were told that NYRO was not provided the workpapers that support S&P's allocation analysis. We cannot comment on what impact, if any, the workpapers or lack thereof have on the accuracy of the analysis. Furthermore, we are not opining on the appropriateness of the procedures performed to produce this analysis.

will not sign off on financial statements with disclosures they know to be wrong. Thus arises the question of whether the omission of a shortfall in the 2000 audited financial statements is evidence that a shortfall did not exist.

Resolution

The 2000 plan-year audited financial statements were released in August 2001 – about one month before S&P completed their analysis that quantified the $1.9 million investment income over-allocation. Therefore, the extent of the shortfall – or more appropriately the loss (see below) - suffered by the Plan was not known when the audited financial statements were issued. Furthermore, the amount of this loss that would be recovered in 2004 through litigation was certainly unknown in August 2001.

Because the loss and recovery could not be reasonably estimated when the financial statements were issued, it would have been inappropriate for the Plan to quantify an expected loss in its financial statements. Instead, in accordance with Generally Accepted Accounting Principles, the Plan's financial statements needed to only disclose the existence of a contingency that may have had a negative impact on the plan. Note 12 to the 2000 plan-year audited financial statements has adequately done so. Similar notes appear in subsequent years' financial statements as well.

We therefore conclude that the omission of a specific disclosure that quantifies a shortfall does not suggest the non-existence of a shortfall.

**Issue 2 – Whether the Trustees Inappropriately Offset $1.5 Million Allocated Employer Contributions with a Portion of the 2000 Plan-Year Earnings**

When they became aware of the existence of a shortfall, the Trustees segregated from the Core Fund Trust $374K of the $1.9 million 2000 plan-year earnings. The Trustees deposited this amount into a New York Life Stable Value Option account[5].

In 2001, the Plan's participating employers paid $1.5 million contributions into the Plan. The contributions were deposited into the Plan's unallocated money-market account called the Fund Office Account (hereinafter referred to as such) [6]. In October 2001, the Trustees were to transfer the contributions into the Core Fund Trust and allocate them among participants' accounts.

Instead of transferring the entire $1.5 million from the Fund Office Account, however, the Trustees transferred only $1.1 million of this amount. It is alleged that the remainder was covered – or "offset" - by their transferring into the Core Fund Trust the $374K held in the New York Life Stable Value Option account[7]. Rather, the Trustees should have transferred into the Core Fund Trust the entire $1.5 million contributions from the unallocated Fund Office Account.

[5] Though segregated, both the Stable Value option account and the Core Fund Trust are allocated investment accounts whose assets should comprise and be equal to the $46.7 million aggregate value of participants' account balances.

[6] Employer contributions are paid into the Fund Office Account before being allocated among participants. The contributions are generally credited to participants' accounts when they are transferred from the Fund Office account into the allocated investment account. (Some contributions are retained in the Fund Office account to cover administrative expenses. They are nevertheless credited to participants' accounts.)

[7] Note that the entire $1.5 million was paid into and held by the Plan. This issue only involves an internal Plan transaction; not a transaction between the Plan and an outside party.

Resolution

Provided that no more than $2.2 million of the transfer was composed of previously allocated assets, we determined that the $374K portion of the employer contributions in question were "paid in advance" as part of a $2.5 million transfer from the Fund Office Account into the Core Fund Trust in June 2001[8]. As described in our report, the Trustees needed only transfer $2.2 million – not $2.5 million – into the Core Fund Trust in June 2001. The excess $374K, therefore, was effectively an advance unallocated funds transfer toward the $1.5 million employer contributions transferred into the Core Fund Trust in October 2001.

Furthermore, regardless of whether this prepayment was made or whatever were the intentions of the Plan's Trustees, we view the October 2001 $374k transfer from the Stable Value Option account as a transaction that is economically unrelated to the $1.5 million contribution allocation. The $374k has already been accounted for as part of the $1.9 million investment income used replace lost assets that were previously allocated among participant accounts. Its transfer to the Core Fund Trust was a consolidation of allocated investment accounts; not an offset of employer contributions allocations.

**Broader Issue – Loss to the Plan and Proportionate Write-Down of Participant Account Balances**

The discussion above primarily focused on the accounting treatment of $1.9 million unallocated investment income vis-à-vis the shortfall between the allocated Plan investments and the total participant accounts. However, the relevance of this discussion is somewhat diminished because of a broader issue: the plan suffered a loss. Whether their accounts were written down, or not increased for investment income or other unallocated assets held in the Plan, the participants will ultimately have to absorb this loss. The recovery of this loss was of prime importance. The mechanics of the allocation of this loss among participants, which essentially is what the accounting treatment of the $1.9 million was, is a secondary issue.

The loss, which was determined to be $1.9 million, was the culmination of the former fund administrator's diversion of plan assets and the misallocations of investment earnings over multiple years. This loss was substantially offset in 2004 when the Plan won a $1.3 million settlement from the former administrator and bonding companies. This left a net loss of $500K ($1.9 million less the $1.3 million recovery) which the Plan's participants have absorbed.

Instead of writing down participants' accounts, the Trustees allocated this loss by 1) not increasing participants' accounts for the $1.9 million 2000 plan-year investment income, and 2) crediting participants' accounts in 2004 for the $1.3 million settlement. (This allocation was transparent to participants because no adjustments were made directly to their accounts.)

The net loss could not have been quantified until the settlement was reached in 2004. It would have been imprudent, therefore, for the Trustees to adjust (i.e., write down) the participants' accounts for the loss before then. Had they done so, the Trustees would have had to readjust the participants' accounts a second time when the net loss was finally determined – thus creating a complicated recordkeeping situation and an unnecessary disturbance among participants.

Similarly, without a precise quantification of the Plan's net loss, a premature allocation of investment income - or of any other unallocated asset – used to cover the shortfall would likely have increased the amount of assets misallocated among participants' accounts. This would further contribute to the series of misallocations that generated the Plan's shortfall thus far.

[8] See note 2 for further discussion about the $2.5 million transfer.

Therefore, whether the:

1. 2000 plan-year investments income was not allocated among participants until a net loss is quantified and a recovery is received by the Plan (as was the case with this Plan),

2. Participants' accounts were adjusted twice to allocate among them the Plan's actual net loss, or

3. Trustees used other available unallocated plan assets to cover the $1.9 million shortfall instead of not allocating the 2000 plan-year investment earnings,

the economic impact to be suffered by the Plan's participants would have substantially been same. ERISA's rules not withstanding, provided the net loss was properly allocated, the Plan's participants were not harmed by the Trustees' actions[9].

The report to follow provides the analyses and documentary evidence that support the conclusions discussed above.

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[9] We have not reviewed the manner in which the net loss was allocated among participants.

**Division of Reporting Compliance**
**)ffice of the Chief Accountant**
**A Practical Inquiry into the Existence of a $1.9 Million Shortfall Suffered by the Asbestos Workers' Annuity Fund and the Propriety of the Actions Taken by the Plan's Trustees to Eliminate It**
**As of December 31, 2000**

## The Issue

In 2000, the Plan's Trustees of the Asbestos Workers Local 12 Annuity Fund-Defined Contribution Plan (the Plan) decided to give participants the option to direct the investments allocated to accounts. When they were about to put this option into effect, the Trustees noted that the investments allocated among participants were less than the aggregate value of the participants' accounts (this shortfall was quantified in 2001 at approximately $1.9 million). Until this shortfall was eliminated, the Trustees could not grant participants the option to direct their investments.

To eliminate this shortfall, the Trustees did not credit (i.e., increase) participants' accounts for the 2000 plan-year's investment income of $1.9 million. By not doing so, the allocated assets held in the Plan balanced with the aggregate value of participants' account balances. Consequently, by June 2001, the participants were able to direct the investments allocated to their accounts.

During its investigation of the Plan, the EBSA's New York Regional Office (NYRO) questioned whether it was appropriate for the Trustees to not have allocated the 2000 plan-year investment income among participants' accounts because:

1. The Plan document requires that plan investment income be allocated among participants at the end of each plan year. By not doing so, the Trustees acted contrary to the Plan document; and

2. There is a question of whether a shortfall existed at all. Had there been no shortfall, there would have been no reason for the Trustees to not allocate the 2000 plan-year investment income.

A second issue surfaced during NYRO's investigation over whether a portion of the 2000 plan-year investment income was inappropriately used to offset employer contributions allocated among participants in 2001.

## Scope of Review

We were asked to review statements, analyses, annual reports, summaries, and other materials provided us by NYRO involving the Plan to determine whether:

1. There was a shortfall of $1.9 million which was eliminated by the Trustees' not allocating the 2000 plan-year investment income of $1.9 million; and

2. Whether the Trustees offset employer contributions with the Plan's investment earnings.

We were not asked to consider any legal issues under ERISA, or any other matters relevant to NYRO's investigation of the Plan.

## Conclusion

Based on our review of the materials provided us by NYRO, we conclude they sufficiently show that:

1. On December 31, 2000, the aggregate value of participants' accounts exceeded the value of assets allocated among participants by $1.9 million. The Trustees effectively eliminated this shortfall by not allocating the $1.9 million investment income for the 2000 plan-year; and

2. The trustees did not offset employer contributions with a portion of the 2000 plan-year investment income.

Our conclusions are based on the financial information contained within the exhibits to this report. Though NYRO provided us additional documents than those exhibited here, we judged them to be neither sufficiently supportive nor disproving of the contentions discussed and conclusions reached in this analysis.

The documents we reviewed are summarizations of the Plan's financial status and activities from 1993 through mid-2001. They present neither details of individual account activity nor evidence to support the performance of specific audit procedures and findings. We have not verified the authenticity of these documents. Furthermore, we are not opining on the sufficiency of any audit or analytical procedures performed by the Plan's accountants or other service providers.

## Background

Asbestos Workers Local 12 Annuity Fund

The Asbestos Workers Local 12 Annuity Fund (the Plan) became effective July 1, 1961. The purpose of the plan is to provide annuity benefits to eligible participants. The Plan also provides for participant loans. The Plan is a defined contribution pension plan established under an Agreement and Declaration of Trust pursuant to collective bargaining agreements between the International Association of Heat and Frost Insulators Local No. 12 of New York City and various employers and employer associations in the construction industry in the five boroughs of greater New York and Long Island.

The Plan is primarily funded by contributions paid by employers pursuant to a collective bargaining agreement. The contributions are paid into the Plan's unallocated money market and other accounts – collectively called the "Fund Office" account. Generally, contributions held in the Fund Office account are not credited to the participants' accounts until they are transferred into the allocated investment trust[10] [11].

The Plan is also credited with earnings generated from investments and interest on participant loans. Pursuant to the Plan document, the Plan must allocate investment income among the participants' accounts at the end of each year.

[10] Beginning in November, 2000, the allocated investment trust was held by the New York Life Trust Company in an account called the "Core Fund Trust."

[11] At December 31, 2000, the Fund Office account apparently held approximately $2.2 million of assets previously allocated among articipants. These assets were transferred into an allocated investment account on June 20, 2001. See further discussion about these assets in Note 2 to the Executive Summary above and **Table 1.1** below.

Shortfall of Allocated Plan Assets

In November 2000, the Plan transferred $43,062,710 assets from the Bank of New York into an allocated fund: the New York Life Trust Company's Core Fund Trust (Core Fund Trust). The value of these assets at December 31, 2000 was $44,480,036[12]. **(Exhibit 1)**

Additionally, approximately $2.2 million assets previously allocated among participants was held in the Fund Office account as of December 31, 2000.

After making the transfer to the Core Fund Trust, the Plan's Trustees intended to provide the participants the option to direct their investments. Before offering this option, however, the Plan's trustees noticed that assets transferred into the Core Fund Trust were less than the aggregate value of participants' accounts (hence, the "shortfall"). Ultimately, this shortfall was calculated to be $1.9 million.

Until the shortfall was eliminated, participants could not direct investments held in their accounts.

The Trustees contend that the shortfall came about because 1) the former Fund Administrator, Jerome Market, diverted money from the Plan, and 2) throughout the 1990s, earnings on the Plan's investments may have been improperly allocated to individual participants' accounts. According to the Plan's Trustees, the improper allocations resulted in over- or under allocations of actual earnings to participants' accounts. This situation was aggravated by the fact that some participants whose accounts were overstated received excessive distributions during the 1990s.

(In **Table 1**, we used **Exhibits 1, 2, 2.1 and 7** to corroborate the existence of a shortfall.)

Plan Trustees' Response to the Shortfall

In 2001, the Plan's trustees engaged the accounting firm Schultheis & Panettieri (S&P) to prepare an analysis "to determine the reasonableness of earnings allocations to participant accounts as compared to actual investment earnings for the period 1990 through 2000."[13] While the investigation was underway, the Trustees decided not to allocate among participants' accounts the $1.9 million of 2000 plan-year investment earnings held in the Core Trust Fund[14].

On June 20, 2001, the Trustees transferred $2.5 million from the unallocated Fund Office account to the Core Fund Trust. Approximately $2.2 million of this transfer represents assets previously allocated among participants (see Note 2 to the Executive Summary above and **Table 1.1** below). The remaining $374K, the Trustees contend, is an "advance transfer" from unallocated plan assets of the employer contributions that were to be allocated in October, 2001.

**Table 2** summarizes how the Plan's Trustees resolved the shortfall and, by June 20, 2001, enabled participants to begin directing the investments allocated to their accounts.

[12] This balance included the $1.9 million investment earnings which were not credited to participant accounts.

[13] Taken from the background section of Schultheis & Panettieri's Independent Accountant's Report on Applying Agreed Upon Procedures dated September 28, 2001. This report describes the procedures the accountants performed and the results they obtained in the Asbestos Workers Local 12 Annuity Fund Interest Allocation Analysis 1990-2000 (**Exhibit 3**).

[14] The Trustees also segregated $374,768 of the $1.9 million into a frozen New York Life Stable Value Option account. This is the portion of investment income that is in question regarding whether the Trustees used it to offset employer contributions in October, 2001.

In September, 2001, S&P issued their Interest Allocation analysis (see **Exhibit 3**) and concluded that participant account balances exceeded net assets available for benefits by $1.9 million as of December 31, 1999. This shortfall continued to exist as of December 31, 2000.

Trustee Activities since Addressing the Shortfall

On October 19, 2001, the Plan's Trustees transferred from the Fund Office account into the Core Fund Trust employer contributions totaling $1,555,604. (See **Exhibit 4** for how this contribution is allocated among participants). The Trustees contend that $1.5 million was composed of a $1,174,505 transfer from the Plan's Fund Office account and an "advance transfer" in June 2001 of $374k also from the Fund Office account.

In 2002 the trustees filed suit against former Fund manger Jerome Market and others to recover the losses caused by the diversions and mismanagement that resulted in the shortfall. In 2004 the lawsuit was settled and resulted in separate payments by fidelity and fiduciary carriers as well as defendants that totaled $1,314,689. Upon receipt of these funds, the trustees claim that the 2000 earnings of $1.9 million were effectively allocated to individual participant accounts up to the $1.3 million recovery. The Plan, consequently, suffered a $500k net loss.

Plan Audits and Reporting

From 1994 through 1999, the Plan was audited by Lawson, Holland & Company, P.C. This firm's audit reports on the Plan's financial statements disclosed no exceptions or indications of any defalcation or misallocation of plan assets.

In 2000, Lawson, et. al. was replaced by Schultheis & Panettieri (S&P), who on August 2, 2001, issued an unqualified report on the Plan's financial statements. Note 12 of the footnotes does indicate the existence of a loss contingency with respect to questionable transactions associated with the plan. However, no provision or specific disclosure regarding the shortfall was made to the financial statements (or Form 5500).

The Forms 5500 throughout this period appear to reflect the current values of plan assets.

## Analysis

1. **Was there a shortfall between the assets allocated among participants and the aggregate value of participant accounts?**

   There are questions over whether a shortfall existed that necessitated the Trustees' to not allocate the 2000 plan-year investment income. The questions are predicated on whether the Trustees failed properly consider the value of participant loans when they calculated the shortfall. Had they done so, they would have observed that the Plan had sufficient assets to cover participants' account balances. **Table 3** compares how the shortfall is calculated depending on the treatment of participant loans.

   As the table shows, if loans, together with investment securities, are compared to the aggregate value of participants' accounts, allocated assets appear to exceed the total participant account balances by $885k.

   An additional question of whether a shortfall existed arose because the shortfall was not specifically disclosed in the 2000 (or subsequent) audited financial statements. This lack of disclosure could be taken to suggest that there was no shortfall to report.

We address both questions in the following analysis:

1a. Did the Trustees' Fail to Properly Consider Participant Loans when Calculating the Shortfall?

No. We conclude that it was appropriate for the Trustees' to not include the value of participant loans when comparing net assets to the $46.7 million aggregate participant account balance at December 31, 2000. As the following analysis shows, participant loans were not included in the $46.7 million. Therefore, when comparing the net assets to the $46.7 million participant account balances, participant loans should likewise be excluded from the net asset amount. **Tables 1 and 3 (left column)** are proper analyses that compute the $1.9 million shortfall. The two tables corroborate one another as they use different approaches to compute the shortfall.

The argument that participant loans should be included with other allocated plan assets when compared to the total participants' accounts can only be based on the assumption that the loans are included in the $46.7 million (see **Table 3 (right column)**. However, the materials we reviewed conclusively indicate that New York Life accounts for loans separately from $46.7 million balance:[15]

a. **Exhibit 2.2** – This is the last page of an analysis of 2000 plan-year account activity by participant. New York Life reports that participants' account balances as of December 31, 2000 total $46.7 million. Note, however, that in arriving at the $46.7 million total, new loans during 2000 were deducted from and loan repayments were added to participants' accounts. For example, Harry Westervelt's activity is summarized as follows:

| | |
|---|---|
| Account Beginning balance | $ 342,578 |
| Less: New participant loans | ( 12,000) |
| Other | ( 620) |
| Add: Contributions | 13,312 |
| Loan repayments | 1,150 |
| Other | 110 |
| Account Ending Balance @ 12/31/2000 | $ 344,530 |

This recordkeeping practice conclusively shows that loan balances are not included in the $46.7 aggregate value of participants' accounts. Instead, participant loan balances are accounted for separately. When the Plan makes loans to participants, it gets the cash to lend by liquidating some of its investments in the participants' accounts (during the period 11/2000 through 6/2001, the only investments liquidated for loans were held in the NYL Core Fund Trust). These liquidations of investments are reflected in **Exhibit 2.2** as deductions from the participants' accounts.

Conversely, when loans are repaid, the Plan deposits the proceeds into the allocated investment account (NYL Core Fund Trust at the time of this Summary). The principal and interest payments are therefore reflected in the Summary as additions to participants' accounts.

[15] We have not been provided with a detailed analysis of what kind of assets the $46.7 million includes. However, considering the materials provided by NYL, and the lack of evidence to the contrary, we may confidently conclude participant loans are not included in the $46.7 million aggregate value of participants' account balances.

If loan balances were included in the $46.7 million participant account total, it would be wrong to deduct new loans and add loan repayments to the participants' account balances. Instead, loan activity would not be shown here at all because each loan related transaction would constitute a "wash" within the participant accounts; essentially an exchange of one asset for another within a single account.

b. Consistent with its accounting for loan activity as illustrated in a. above, NYL deducted participant loans from the $46.7 million aggregate value of participants' account balances in its Plan-level analysis of participant account activity from December 31, 2000 to June 20, 2001 (**Exhibit 2**). Conversely, loan repayments were added. For the same reasoning discussed in a. above, for this analysis to be valid, participant loans must be accounted for separately from the $46.7 million participant account total. (See **Exhibit 2.1** for an explicit confirmation from Crystal Corpus, Legal Assistant of the New York Life Investment Management, regarding **Exhibit 2** that the Loan Fund is "indeed a separate item and in addition to the amounts listed on the first page."

c. NYL's recordkeeping practice of accounting for loans separately from participant account balances is further demonstrated in **Exhibit 2.3**. In the row captioned "Self Directed Core Fund," the summary of 2001 fund activity begins with the December 31, 2000 total participant account balance of $46.7 million. Again, in this summary, new loans are deducted and loan repayments are added to the various listed participant directed investments.[16]

d. Furthermore, the NYL monthly statements (**Exhibits 5.1 – 5.6**) show that for recordkeeping purposes, NYL segregates participant loans from other investment accounts. **Table 4** further demonstrates NYL's segregated recordkeeping of participant loans from investment accounts by reconciling loan activity reported in NYL's monthly statements to NYL's rollforward of participants' account balances from December 31, 2000 to June 20, 2001 **Exhibit 2**.

1b. Additional Issue: Financial Information Used in the Schultheis & Panettieri Annuity Fund Interest Allocation Analysis does not Match Audited Financial Statements

Another question arose over the credibility of S&P's Interest Allocation Analysis that calculated the $1.9 million over-allocation. Net Income, Invested Assets, and Allocable Net Assets amounts used in S&P's analysis does not agree with the corresponding amounts in the audited financial statements. The differences between S&P's amounts and the audited financial statements as determined by NYRO are summarized in **Exhibit 6.1**. If left unreconciled, the basis upon which S&Ps analysis was built would be in serious question.

We traced "Net Income," "Invested Assets," and "Allocable Net Assets," presented by S&P in its analysis to the respective amounts reported in Forms 5500 filed for the period 1994 through 1999[17]. (See **Exhibit 6** for our analysis. **Exhibit 6.2** lists the reasons for the variances between S&P's Analysis and **Exhibit 6.1**. S&P's Annuity Fund Interest Allocation Analysis is presented in **Exhibit 3**, and Forms 5500 and audited financial statements appear in **Exhibits 7.1 thru 7.7.**)

[16] NYRO was unable to provide us with a complete report – including totals.

[17] Note that we are not opining upon the credibility of the analytical approach and determinations reached by S&P.

The financial statements from 1994 through 1999 were audited by the Plan's predecessor accountants, Lawson, Holland & Company, P.C. (LHC)[18] Each year these accountants issued reports that disclosed no exceptions or matters of concern.

The financial statements audited by LHC were significantly deficient in several ways. Most notable is that the Statement of Changes of Net Assets is prepared on the cost-basis of accounting. This accounting method does not take into consideration market fluctuations in the valuation of plan assets. Therefore, unrealized gains/losses are excluded.[19] (See **Exhibit 8** for a supplemental discussion regarding the necessity to properly audit unrealized gains and losses.)

S&P restated the 1999 audited financial statements to conform to generally accepted accounting principles and be comparable to the 2000 plan-year audited financial statements.

Given this and other exceptions, we do not view the audited financial statements issued for the plan years 1994 through 1999 to be a credible starting point for a financial analysis.

1c. The December 31, 2000 audited financial statements make no reference to a shortfall. Does this suggest there was no additional shortfall at the end of 2000?

No. Because the shortfall – or, more precisely, net loss - could not be determined at the time the financial statements were issued, any quantified disclosure of the shortfall would have been premature and inappropriate. Instead, the audited financial statements properly disclose a loss contingency suffered by the Plan.

Footnote 12 to the audited financial statements mentions the amounts reported in the audited financial statements may differ pending an ongoing investigation of transactions that may have been fraudulent. The footnote says that the outcome of the investigation is uncertain, and therefore no adjustment has been made to the audited financial statements.

Financial Accounting Standards Board Statement #5 discusses how to record and/or disclose contingent losses such as that involving the Plan. A loss contingency should be accrued if **both** of the following conditions are met:

1. Information available prior to the issuance of the financial statements indicates that it is **probable** that a liability {loss} has been incurred as of the date of the financial statements; and

2. The amount of the loss can be **reasonable estimated**.

If the loss is either probable or estimable, but not both, and if there is at least a reasonable possibility that a liability {loss} may have been incurred, the following disclosures in the notes to the financial statements is required:

[18] Beginning in the year 2000, the accountants were replaced in 2000 by Schultheis & Panettieri. This is the Firm that prepared the Annuity Fund Interest Allocation Analysis discussed here.

[19] Other deficiencies in the audited financial statements include:

1. Statements of Net Assets are not comparative
2. Notes to financial statements do not reconcile differences between the financial statements and the Forms 5500
3. Some Auditors' Reports do not conform to professional standards
4. Auditors' Reports do not extend to schedules of assets held for investments
5. Most audited financial statements lack footnote disclosures

1. The nature of the contingency; and

2. An estimate of the possible loss or range of loss or a statement that an estimate cannot be made.

S&P did not complete its interest allocation analysis until September 28, 2001 (**Exhibit 3**). The 2000 plan-year audited financial statements were issued August 2, 2001 (the date of the audit report), almost 2 months prior to S&P's completion of its analysis. Therefore, at the time the financial statements were issued, the gross loss of $1.9 million could not be quantified. Furthermore, the outcome of any future litigation was not at all estimable.

Therefore, at the time the audited financial statements were issued, it was impossible to estimate the net loss to the Plan as a result of the defalcation of plan assets and misallocations of investment income throughout the 1990's.

Note 12 appropriately acknowledges this uncertainty. Note 12 also broadly but sufficiently describes the circumstances that led to the loss contingency. Therefore, it is our opinion that Note 12 complies with the disclosure requirements of Generally Accepted Accounting Principles. The lack of a specific disclosure that quantifies the shortfall does not suggest the non-existence of the shortfall.

1d. Did the non-allocation of the 2000 plan-year's investment earnings of $1.9 million eliminate the shortfall?

Yes. The non-allocation of the 2000 plan-year earnings eliminated the shortfall between allocated investments and total participant account balances. As **Table 5** shows, had the Trustees allocated the earnings among participant accounts (i.e., increased participants' accounts by the investment earnings), the allocated investments would continue to be less than the participant account balances by $1.9 million.

**2. Did the Plan's Trustees inappropriately use a portion of the 2000 plan-year investment earnings ($374k) to offset the $1,555,604 employer contribution transmittal of October 19, 2001?**

No. **Table 2** shows that the $2.5 million transfer from the Fund Office account resulted in allocated plan assets exceeding the aggregate value of participant accounts by $374k. This overage occurred because Trustees transferred $374k over the $2.2 million allocated assets held in the Fund Office account. The $374k was not credited to participants' accounts when it was transferred in June, 2001.

Participants' accounts were credited – or increased – for the June, 2001, $374k transfer when the Trustees allocated employer contributions in October, 2001. The remaining employer contribution amount of $1.17 million was transferred into the allocated investment accounts at that time. Therefore, substantially all of the $1.5 million employer contributions were allocated and credited to participants' accounts in October, 2001.

The $374k held in the frozen NYL Stable Value Option account was accounted for as part of the $1.9 million 2000 plan-year income. It was used by the Trustees to replace lost assets that were previously allocated among participants. Therefore, the transfer of the $374k plus earnings from the Stable Value

Option into the Core Fund Trust was a consolidation of allocated investments into a single account. The transfer had no economic relevance to the $1.5 million employer contribution allocation.

**Additional Issue: Non-Allocation of Other Plan Assets Available as of June 20, 2001**

We understand that as of June 20, 2001, at least $600k was held in other plan accounts that were not allocated among participants. There is a question of why the Trustees did not allocate the $600k+ among participants to give them a partial benefit of the non-allocated $1.9 million investment income.

Regardless of how it would be allocated, the participants were destined to absorb some or all of the $1.9 million loss. Had the Trustees credited participant accounts for unallocated assets existing in the plan as of December 31, 2000, they would have had to write down participants' accounts by approximately $500 ($1.9 shortfall less the $1.3 million recovery) to absorb the net loss.[20] Therefore, as discussed in the Executive Summary above, it would not have been practical for the Trustees to have credited participants' accounts with any unallocated assets – including the $600+ cash or the $1.9 million 2000 plan-year investment earnings – until the net loss was quantified.

[20] We have not assessed the allocation of the net loss among current and former participants.

# Tables

**Table 1**

**Calculation of Shortfall at December 31, 2000 (Bottom-Up Approach)**

| | | |
|---|---|---|
| Aggregate value of participant account balances as of 12/31/00 per analysis of participant account balances faxed by New York Life Benefit Services (**Exhibit 2**), the final page to the 12/31/2000 NYL Annuity Fund Summery by Member (**Exhibit 2.2**), & the 2000 plan-year Audited Financial Statements footnote 9 (**Exhibit 7.1**) | | $46,686,166 |
| Total value of assets held in Core Fund Trust per New York Life Trust Statement at 12/31/0000 (**Exhibit 1**) | $44,480,036 | |
| Less: Unallocated 2000 plan-year investment earnings that were not included in the $46.7 million aggregate value of participant account balances. That way, we are comparing to total participant account balances trusteed assets that have actually been allocated among participants. | (1,871,978) | |
| Add: Assets held in the Fund Office Account previously allocated among participants' accounts (See note 2 to the Executive Summary above) | 2,187,124 | |
| Add: In-Transit Loan Repayment (See **Exhibit 2** and **Table 4**) already included in the $46.7 total participant account amount | 19,000 | |
| Total Investments Allocated Among Participants' Accounts | | 44,814,182 |
| **Excess Aggregate Value of Participants' Accounts over Allocated Plan Assets (i.e., Shortfall) at 12/31/00** (rounded) | | ($1,900,000) |

**Table 1.1**

**Reconciliation of Plan Net Assets**
**At December 31, 2000**
**To the $2.2 Million Allocated Plan Assets**
**Held in Fund Office Account and**
**Transferred into the Core Fund Trust**
**On June 20, 2001**

| | | |
|---|---|---|
| Net Assets Available for Benefits 12/31/2000 (Exhibit 7.1) | $ 49,497,552 | |
| Less: 2000 plan year investment income not allocated among participant accounts | ( 1,871,978) | |
| Participant loans | ( 2,756,494) | |
| Other non-allocated assets per Note 9 of audited f/s | ( 54,892) | |
| Assets Allocated Among Participants at 12/31/2000 | | $ 44,814,188 |
| Assets held in the Core Fund Trust Account at 12/31/2000 (Ex. 2) | 44,480,036 | |
| Less: 2000 plan year investment income not allocated among participant accounts | ( 1,871,978) | |
| Assets held in the Core Fund Allocated Among Ps&Bs | | 42,608,058 |
| Allocated Assets Held Outside Core Fund Trust (i.e. Fund Office Account) Transferred into the Plan on June 20, 2001 (rounded) | | $ 2,200,000 |

**Table 2**

**Illustration of Trustee Actions Taken to Eliminate Shortfall**
(excluding loan fund)

| | Investments Allocated Among Participants | Aggregate Participant Account Balances | (Shortfall)/ Overage |
|---|---|---|---|
| Allocated investments held in the NYL Core Fund Trust at 12/31/2000 | $44,480,036 | | |
| Add: Allocated assets held in the Fund Office account at 12/31/2000 | 2,187,124 | | |
| Add: In-Transit Loan Repayment (See **Exhibit 2** and **Table 4**) already included in the $46.7 total participant account amount | 19,000 | | |
| Less: 2000 plan-year investment earnings not allocated among participants | (1,871,978) | | |
| Balances Before 2001 Plan-Year Transactions and Trustee Actions to Eliminate Shortfall | 44,814,182 | 46,686,160 | (1,871,978)[21] |
| **Account Transactions Between 1/1/01 and 6/20/01:** | | | |
| New Loans (**Table 4**) | (225,685) | (225,685) | 0 |
| Loan Repayments (**Table 4**) | 244,547 | 244,547 | 0 |
| Withdrawals (**Table 4**) | (97,475) | (97,475) | 0 |
| Balances Before Trustee Actions to Eliminate Shortfall | 44,735,569 | 46,607,547 | (1,871,978) |
| **Trustee Actions to Eliminate Shortfall:** | | | |
| Non-allocation of 2000 plan-year investment income | 1,871,978 | | 1,871,978 |
| 6/20/2001 Transfer of $2.5 million from Fund Office account **in excess** of the $2.2 million assets previously allocated to participants' accounts | 374,774 | | 374,774 |
| Total Trustee Actions to Eliminate Shortfall | 2,246,752 | 0 | 2,246,752 |
| **Balances at 6/20/2001 Before Application of 2001 YTD Investment Income ($1.3 million)** | $46,982,321 | $46,607,547 | $374,774[22] |

[21] Rounds to $1,900,000

[22] This overage is a consequence of the Trustees transferring more than the $2.2 previously allocated assets into the allocated trust funds. It is because of this overage that the Trustees argue that a portion of the 2001 employer contributions were prepaid.

**Table 3**

**Comparison of Plan Asset Shortfall Depending on Consideration of Participant Loans (Top-Down Approach)**

| | Calculation of Shortfall at 12/31/00 per Fund Trustees | | Calculation of Shortfall at 12/31/00 had Loans Been Added to Aggregate Value of Participants' Accounts | |
|---|---|---|---|---|
| Aggregate value of participant account balances per analysis faxed by New York Life Benefit Services (**Exhibits 1, 2 and 2.1**) & 2000 Audited Financial Statements foot note 9 (**Exhibit 7.1**) | | $46,686,166 | | $46,686,166 |
| Plan net assets as of December 31, 2000 | $49,497,552 | | $49,497,552 | |
| Less: Unallocated 2000 plan-year investment earnings not included in participant account balances (see discussion above) | (1,871,978) | | (1,871,978) | |
| Participant Loans | (2,756,494) | | Assumed to be Included in Aggregate value of Participant Account Balances | |
| Unallocated 2000 plan-year per Note 9 of the audited financial statements | ( 54,892) | | ( 54,892) | |
| Assets Allocated among Participants | | 44,814,188 | | 47,570,682 |
| **Account (Shortfall)/Excess at 12/31/00** (rounded) | | ($1,900,000) | | $ 884,516 |

**Table 4**

**Reconciliation of Loan Activity & Distributions per NYL Rollforward to NYL Monthly Statements**

| | Amounts per NYL Monthly Statements (Exhibits 5.1 to 5.6) | | | |
|---|---|---|---|---|
| | New Loans | Loan Repayments | Other | Distributions |
| January | | $78,180 | | |
| February | | 2,408 | | |
| March | | 48,166 | | |
| April | ($28,314) | 65,898 | ($19,000)[23] | |
| | | | (1,020) | |
| May | (170,371) | 55,112 | (566) | ($97,475) |
| June (thru the 20th) | (27,000) | 15,369 | | |
| | | 265,133 | (20,586) | |
| Less: Reconciling Difference | | (20,586) | 20,586 | |
| Totals per NYL Rollforward (Exhibit 2) | ($225,685) | $244,547 | 0 | ($97,475) |

[23] In-Transit Loan Repayment (See **Exhibit 2**) already included in the $46.7 total participant account amount

**Table 5**

**Illustration of Remaining Shortfall if 2000 Plan-Year Earnings were Allocated Among Participant Accounts**
(excluding loan fund)

| | Allocated Investments | Aggregate Participant Account Balances | (Shortfall)/Overage Rounded |
|---|---|---|---|
| Allocated assets held with NYL as of 12/31/2000 | $44,480,036 | | |
| Add: Allocated assets held in the Fund Trust accounts As of 12/31/2000 | 2,187,124 | | |
| Add: In-Transit Loan Repayment (See **Exhibit 2** and **Table 4**) already included in the $46.7 total participant account amount | 19,000 | | |
| Less: 2000 plan-year investment earnings held in NYL not allocated among participants as of 12/31/00 | (1,871,978) | | |
| Assets Allocated Among Participants at 12/31/2000 | 44,814,182 | $46,686,160 | ( $1,900,000) |
| Allocation of 2000 plan-year investment earnings among participants' accounts | 1,871,978 | 1,871,978 | |
| Balances After Allocation of 2000 Plan-Year Income Added to Participant's Accounts/(Remaining Shortfall After Income Allocation) | 46,686,160 | 48,558,138 | ( $1,900,000) |

20

Exhibit J

**Albert, Scott - EBSA**

|  |  |
|---|---|
| 'rom: | Castillo, Jose - EBSA |
| Sent: | Thursday, February 05, 2009 4:23 PM |
| To: | Albert, Scott - EBSA |
| Cc: | Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA; Castillo, Jose - EBSA |

For the record:

Scott,

Information provided to you by phone on 2/3/2009:

During the Dec. 15, 2008 meeting, you stated that you will review the latest discovery about the Annuity Fund Interest Allocation Analysis dated Sept. 28, 2001. I was told by Goldberg that you will finish it shortly.

As I stated, this project is fraudulent and the trustees is using this as the bases of their claim that there was a shortfall in plan assets as of 12/31/1999 or 2000.

At this point, I understand that you are trying to make you own determination if in fact there was a shortfall.

You are assuming that this analysis is NOT FRAUDULENT.

As I told Jonathan Kay, the regional director, I spent almost the whole day reviewing the data on this analysis and comparing it to the financial statements from 1993 to 1999.

I told him that this analysis is FRAUDULENT and I need to start a criminal investigation because the criminal statue is getting closer.

ince I was told to wait for your determination on this analysis, I assumed that you will complete it soon.

For your information, when I discovered back in November 2005 that the allocation of the 2000 earning was not done, A CRIMINAL INVESTIGATION SHOULD HAVE BEEN STARTED. The criminal statue expired a long time ago.

The Annuity Fund is a defined contribution (dc) plan. The allocation of the Net Assets Available for Benefits are normally done to individual participant accounts according to the procedures set forth in the plan instrument or in a collective bargaining agreement. (See AICPA Audit and Accounting Guide for Employee Benefit Plans, Section 10.17, page 165).

The Annuity Fund plan documents states;

"Allocation of Investment Experience; As of each valuation date, the investment fund's) of the Trust shall be valued at fair market value, and the income, loss, appreciation and depreciation (realized and unrealized), and any paid expenses of the Trust attributable to such fund shall be apportioned among Participants' account within the fund based upon the value of each Account within the fund as of the preceding Valuation date". (See Section 4.1(c) of the plan document).

So, in other words, even if in fact there was a shortfall, as per plan document and AICPA, the allocation should have been done. That's the law.

That way, the correct and true account balance of each participant will be reflected.

There was no shortfall according to the financial records. The shortfall Bob Goldberg and Tonathan Kay wants you to identify does not exist.

And, as I do not hesitate to say, an attempt to cover-up a fraud.

The two documents I mentioned above are exhibits on my Report of Investigation, Part II.

.ll kinds of spins are being used "just to see if a short fall will reflect".

One is the attempt by Kay to classify Loan Receivables as not a plan asset. Another spin of Heinzman was an attempt to classify the $2,561,898.34 deposit done in 6/19/2001 as not a plan asset.

Two of the senior investigators who are also CPAs, as I mentioned to you, already reviewed this case more than a year ago.
They all told me that I am 100 percent correct.

Another senior investigator, who I think is also a CPA, reviewed this with me when he was my acting supervisor (back in Jan. 2007). He stated to me that there is big time fraud here. However, the next day he told me that I can only discuss with him my other cases. Local 12 Annuity Fund is forbidden as per instruction from somebody above him.

Jose Castillo
Auditor
212-607-8650

Exhibit 2

**Albert, Scott - EBSA**

---

**From:** Castillo, Jose - EBSA
**Sent:** Friday, February 06, 2009 2:51 PM
**To:** Albert, Scott - EBSA
**Cc:** Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA
**Subject:** More info

For the Record:

Scott,

Additional info provided to you by phone on 2/3/2009:

You requested my help in finding out if the $2,561,898.34 money transfer in 6/19/2001 was allocated to the participants' account balances.

My response to you is NO and as I stated I have the three participant account statements to prove that.

It's Exh. 102, ROI, Part II.

The three participants Daily Activity statements show NO 6/19/2001 entries to reflect the allocations.

It appears that you are trying to see if the $2,561,898.34 can be included or added to the total participants account balance as of 12/31/2000 of $46,686,166.00.

Another way to prove it is to look at the total participants account balance as of 6/20/2001. The New York Life statement shows the balance as $46,607,942.91. (Exh. 97).

As of 6/30/2001, the balance is $46,686,981.23 (Exh. 97B).

So, there is NO WAY that the $2,561,898.34 could have been included to the $46,686,166.00 as of June 30, 2001.

If you need these documents I can email or fax it to you and also Exh. 90 (the plan document) and Exh. 146B (AICPA Audit Guide for Employee Benefit Plans).

Thanks

Jose Castillo
Auditor

This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Employee Benefit Security Administration. If you think you received this message in error, please notify the sender immediately.

Exhibit 4



**)ert, Scott - EBSA**

**From:** Castillo, Jose - EBSA
**Sent:** Thursday, February 12, 2009 9:08 AM
**To:** Pagano, Carmela - EBSA
**Cc:** Albert, Scott - EBSA
**Subject:** FW: A document you showed to Carmela

---

**From:** Castillo, Jose - EBSA
**Sent:** Thursday, February 12, 2009 8:49 AM
**To:** Albert, Scott - EBSA
**Cc:** Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA
**Subject:** RE: A document you showed to Carmela

For the record:

Scott,

I just spoke to her.

As far as Local 12 Funds is concern, I spoke to Carmela about the accounting issue of Loan Receivables as a plan asset.
Two years ago I showed her a document that may not be about Local 12 Funds

ht be about . I completed the civil investigation of Funds and there was a consent judgement obtained from the federal court last July 2008.

I started the investigation of Fund one year after I opened the cases for Local 12 Funds.

Carmela is doing a criminal investigation of at that time and she is still on the criminal case.

Remember as a civil investigator for Funds, I am not allowed to get information from the criminal investigator.
However, the criminal investigator are 100 percent allowed to obtain info from me as the civil case investigator.

Jose Castillo
212-607-8650

---

**From:** Albert, Scott - EBSA
**Sent:** Wednesday, February 11, 2009 2:49 PM
**To:** Castillo, Jose - EBSA
**Subject:** A document you showed to Carmela

Carmela, says about 2 years ago, you showed her a single page document and asked if she could trace something. She doesn't remember what it was. Could you show it to her again (and send me an image)?

ks!

Exhibit 5

**Albert, Scott - EBSA**

---

**From:** Castillo, Jose - EBSA
**Sent:** Friday, February 20, 2009 10:49 AM
**To:** Albert, Scott - EBSA
**Subject:** RE:

Scott,

You said the financial statements prepared by the accountant preceding S & P were not deficient. What do you mean?

Also, unrealized gains and losses were not reported.

You seems to be saying that the Form 5500s reporting reported unrealized gains and lossess.

But is there any financial data available to support the reporting of these unrealized gains and losses?

There seems to be none. If there is none, what would be the basis for reporting these on the Form 5500s?

Is using data from the Form 5500s then correct in doing this analysis?

Sincerely

Jose Castillo

-----Original Message-----
From: Albert, Scott - EBSA
Sent: Friday, February 20, 2009 10:33 AM
To: Castillo, Jose - EBSA
Subject: RE:

The financial statements (prepared by the accountant preceding S&P) were not deficient. They did not report unrealized gains and losses - a critical financial item to any employee benefit plan. Truthfully, for a number of reasons, these audited financial statements do not comply with ERISA's requirements and would be rejected by our office.

Yes, S&P's analysis is based on Form 5500 data.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Friday, February 20, 2009 10:28 AM
To: Albert, Scott - EBSA
Subject: RE:

For the record:

Scott,

I called you a few times and left messages since last week.

You are saying that you are not making conclusion on the validity of this analysis dated 9/28/2001 (Annuity Interest Allocation Analysis).

Are you aware that this analysis used data from the Form 5500s instead of the financial statements?

Are you aware that Goldberg told me to wait for your conclusion of this analysis?

If this analysis is FRAUDULENT, EBSA needs to start a criminal investigation.

The criminal statue is nearing for expiration.

y Goldberg telling me to wait for your conclusion and you saying that you are not making one anuway is an effort to either delay the process of starting the criminal investigation so that the staue will expire OR to ignore this possible criminal violation.

Please call me.

Sincerely

Jose Castillo

-----Original Message-----
From: Albert, Scott - EBSA
Sent: Thursday, February 05, 2009 5:09 PM
To: Castillo, Jose - EBSA
Subject: RE:

All I did was tie some of the data into annual reports filed throughout the 1990s. I'm making no conclusion on the validity of the analysis itself.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Thursday, February 05, 2009 4:23 PM
To: Albert, Scott - EBSA
Cc: Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA; Castillo, Jose - EBSA
Subject:

For the record:

Scott,

Information provided to you by phone on 2/3/2009:

During the Dec. 15, 2008 meeting, you stated that you will review the latest discovery about the Annuity Fund Interest Allocation Analysis dated Sept. 28, 2001. I was told by Goldberg that you will finish it shortly.

As I stated, this project is fraudulent and the trustees is using this as the bases of their claim that there was a shortfall in plan assets as of 12/31/1999 or 2000.

At this point, I understand that you are trying to make you own determination if in fact there was a shortfall.

You are assuming that this analysis is NOT FRAUDULENT.

As I told Jonathan Kay, the regional director, I spent almost the whole day reviewing the data on this analysis and comparing it to the financial statements from 1993 to 1999.

I told him that this analysis is FRAUDULENT and I need to start a criminal investigation because the criminal statue is getting closer.

Since I was told to wait for your determination on this analysis, I assumed that you will complete it soon.

For your information, when I discovered back in November 2005 that the allocation of the 2000 earning was not done, A CRIMINAL INVESTIGATION SHOULD HAVE BEEN STARTED. The criminal statue expired a long time ago.

.he Annuity Fund is a defined contribution (dc) plan. The allocation of the Net Assets Available for Benefits are normally done to individual participant accounts according to

Exhibit 6

**Albert, Scott - EBSA**

**From:** Castillo, Jose - EBSA
**Sent:** Thursday, February 26, 2009 3:36 PM
**To:** Albert, Scott - EBSA
**Subject:** Participants account balance Local 12 Annuity Fund

For the record:

Scott,

I faxed to you 16 pages of documents to explain that your theory that the amount of the loan should also be included to the total participants account balance is bizarre to me just like an attempt to classify loan receivable as NOT A PLAN ASSET. I have never heard of it before, until the 12/15/2008 meeting.

As I explained to you, the Annuity Fund is a defined contribution plan and it works just like the 401(k), 403(B) or our TSP.

When you take a loan out of your account from these plans, the remaining account balance is minus the loan taken.

The three types of documents faxed to you are on Exh. 104, Vol 24 and Exh. 27 Vol. 26 of the ROI, part II.

Note no. 1, page 5 of the 2000 notes to the financial statements clearly states how a participant's account balance is figure out.
You have this document and it is Exh. 122, Vol 26 of ROI, part II and Exh. 76, Vol. 14 of ROI, part I.

In fact, we reviewed this document together 12/15/2008.

One is the page 15 of the 2000 participant statements issued by the Fund office. This page shows [illegible].
He has taken a $12,000 loan. As you see, this amount is minus against his total account balance.

At the bottom of this page is clear and simply, it says total participant accounts per NYL 12/31/2000 $46,686,166.

It's circled for emphasis not by me but by S & P auditor. Remember this is also part of the audit work papers.

The other is the NYL participant account register as of 12/31/2001, As you see, the prior balance is $46,686,166 and then you add and subtract all the activities that took place in 2001 and what you got is the participant account balance as of 12/31/2001 for this particular option.

It seems that you are trying to add the Loan Fund amount of $2,756,494.00 to the total participants account balance of $46,686,166 to arrive at a total of $49,442,660.

Net assets available for benefits as of 12/31/2000 is $49,497,552.00

If this is done, then the alibi that net asset was less than the total participant account balance may fly????????????

However, this theory can not be supported by any document.

On the other hand, I have all the document to prove that as of 12/31/2000 total participant account balance is $46,686,166.

If somebody can document that as of 12/31/2000 total participant account balance is otherwise, I would like to see that document.

Thanks for your attention.

Sincerely

Jose Castillo
Auditor
212-607-8650

EXHIBIT 8.

**Albert, Scott - EBSA**

---

**From:** Castillo, Jose - EBSA
**Sent:** Thursday, February 26, 2009 5:37 PM
**To:** Albert, Scott - EBSA
**Subject:** RE: Participants account balance Local 12 Annuity Fund

For the record:

I will be here Monday and I will find the three statements

Scott, when Jonathan Kay send that memo dated 12/8/2008, he was trying to classify loan receivable as not a plan asset and he was trying to solicit your determination for the purpose of letting the alibi of the trustees fly and cover-up a fraud.

Now that it did not work, what you are saying here is , the loan fund is an asset of the participants' account.

Remember the alibi of the trustees. It is always evolving. It appears that its again going in that direction and its not coming from the trustees.

Let's make this clear,

1) The loan receivable is of course an asset of the plan as what you are saying, however, the question here is not about what's in the asset of the individual participants' account. Let's make this clear, the question is "What is the total participants account balance as of 12/31/2000.

The comparison here is: What is the total Net Assets Available for Benefits and What is the total participant account balance as of 12/31/2000.

The asset issue of laon recievable does not play any role on the total participants account balance side. It's role is on the plan asset side.

Scott, you are inserting to the comparison, that loan receivable is an asset of the participants account.

Please explain to me, how come it is being deducted from the participants account and how could it be an asset if it is not there? If is is not there, there is no value. An asset is something that has a value.

Explain it to me and cite any documeted example.

When Mr. [illegible] gets his statement, it only show the $344,530.54 as his total account balance. The $12,000 loan he took is deducted. He spent it, went to Vegas and gamble it. Off course this $12,000 is an asset to the plan, but how could this be his asset as far as his annuity plan account statement is concern? It's not there anymore.

Give me any documented examples where it shows loan taken out as still part of the account balance.

Scott, the question here is: what is Mr. [illegible] account balance as of 12/31/2000??

Sincerely

Jose Castillo

-----Original Message-----
From: Albert, Scott - EBSA
Sent: Thursday, February 26, 2009 4:43 PM
To: Castillo, Jose - EBSA
Subject: RE: Participants account balance Local 12 Annuity Fund

Loans are still assets of individual participants' accounts. The asset was converted from the investments (securities) to a loan receivable. Most institutions report in their account statements to participants (which I'd still like to get a copy of) loan balances in memo form. But that's bookkeeping.

If you want to know what assets are in the participant's account, you've got to consider both loans and the securities. That's why when a participant takes distribution of his entire account and has not paid off the loan, he gets a 1099R for both the securities and the unpaid loan balance. Those are the assets distributed to the participant.

We'll talk more.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Thursday, February 26, 2009 3:36 PM
To: Albert, Scott - EBSA
Subject: Participants account balance Local 12 Annuity Fund

For the record:

Scott,

I faxed to you 16 pages of documents to explain that your theory that the amount of the loan should also be included to the total participants account balance is bizarre to me just like an attempt to classify loan receivable as NOT A PLAN ASSET. I have never heard of it before, until the 12/15/2008 meeting.

As I explained to you, the Annuity Fund is a defined contribution plan and it works just like the 401(k), 403(B) or our TSP.

When you take a loan out of your account from these plans, the remaining account balance is minus the loan taken.

The three types of documents faxed to you are on Exh. 104, Vol 24 and Exh. 27 Vol. 26 of the ROI, part II.

Note no. 1, page 5 of the 2000 notes to the financial statements clearly states how a participant's account balance is figure out.
You have this document and it is Exh. 122, Vol 26 of ROI, part II and Exh. 76, Vol. 14 of ROI, part I.

In fact, we reviewed this document together 12/15/2008.

One is the page 15 of the 2000 participant statements issued by the Fund office. This page shows .
He has taken a $12,000 loan. As you see, this amount is minus against his total account balance.

At the bottom of this page is clear and simply, it says total participant accounts per NYL 12/31/2000 $46,686,166.

It's circled for emphasis not by me but by S & P auditor. Remember this is also part of the audit work papers.

The other is the NYL participant account register as of 12/31/2001, As you see, the prior balance is $46,686,166 and then you add and subtract all the activities that took place in 2001 and what you got is the participant account balance as of 12/31/2001 for this particular option.

It seems that you are trying to add the Loan Fund amount of $2,756,494.00 to the total participants account balance of $46,686,166 to arrive at a total of $49,442,660.

Net assets available for benefits as of 12/31/2000 is $49,497,552.00

If this is done, then the alibi that net asset was less than the total participant account

Exhibit 9

**Albert, Scott - EBSA**

---

| | |
|---|---|
| **rom:** | Castillo, Jose - EBSA |
| **Sent:** | Thursday, February 26, 2009 5:52 PM |
| **To:** | Albert, Scott - EBSA |
| **Subject:** | RE: I'm referring to |

Scott,

I have a complete statement from one partcipant, not . He took two loans, one for $20,000 and another for $5,000.
These amounts were deducted from his total account balance.

Please explain to me why these amounts according to your views are still part of this account.

Also,

The New YorK Life statements from 2000 until 2004 show all the laons taken by participants. All the loan amounts are deducted from the total assets of the Fund and the amounts are added to the loan fund.

*Please explain to me why these loan amounts are still part of the the participants account balance.

Sincerely

Jose

-----Original Message-----
From: Albert, Scott - EBSA
ent: Thursday, February 26, 2009 5:15 PM
o: Castillo, Jose - EBSA
Subject: I'm referring to

A participant's distributable portion of total plan assets. Anyhow, I definitely want to continue this discussion with you. Will you be around monday?

Scott C. Albert
Chief, Division of Reporting Compliance
US Dept. Of Labor

Exhibit 10



**.bert, Scott - EBSA**

**From:** Castillo, Jose - EBSA
**Sent:** Friday, February 27, 2009 11:05 AM
**To:** Albert, Scott - EBSA
**Subject:** RE: Are you in?

For the record:

This is important because comes March 9 to 13 when the Assistant Inspector General Gene Cunningham gets back here, the communication between us would be part of my statements.

Scott,

Let's make this clear. I think I may have used an incorrect description of certain items concerning the documents.

I apologized for that, however , your theory is simply dead wrong.

As reflected on one of the faxed document I sent to you ( labeled page 2) the starting balance for 2001 of the total participants account balance is $46,686,166. This amount was carried forward from 2000.

The 2000 total participants account balance as of 12/31/2000 is clearly $46,686,166. This is the amount carried forward to the above mentioned document.

So, there is no way that this amount could be incorrect.

ree with you that the loan receivable(loan fund) is part of the participant account balance , however, the way to put its role is .iply dead wrong.

The $46,686,166 total participants account balance already includes the $2,756,494 loan receivable fund.

Your theory of adding the $2,756,494 to the $46,686,166 is not correct and it means putting that amount two times.

Review the two documents I faxed to you and the New York Life statements.

As I demonstrate to you 12/15/2008, the approximate total participant account balance is shown on the Assets held for investment section, on the Cost Basis Column.

I have a memo to file dated June or July of 2006 recording my phone conversation with NYL concerning how their statement can be understood.

If you add the bottom line amount( cost basis ) with the loan receivables of $2,756,494, you will arrive at the amount close to the $46,686,166.

The explanation of NYL for the difference is due to some adjustments not recorded.

I will send a separate email concernign the issue of the filed financial statements from 1999 to the prresent.

The way I view it , IF YOU DETERMINED THAT there is a short fall of $1.9 million in 1999 , is that the filings from 1999 and on are all fraudulent because the $1.9 short fall was not put into play.

On the other hand, the way I view it the other way, THERE WAS NO SHORT FALL OF $1.9 M THAT'S and all the filings are rect.

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**From:** Albert, Scott - EBSA
**Sent:** Friday, February 27, 2009 10:13 AM
**To:** Castillo, Jose - EBSA
**Subject:** Are you in?

Exhibit 11

**Albert, Scott - EBSA**

| | |
|---|---|
| **From:** | Albert, Scott - EBSA |
| **Sent:** | Tuesday, March 03, 2009 12:10 PM |
| **To:** | Castillo, Jose - EBSA |
| **Subject:** | RE: You involvement |
| **Importance:** | High |

I'm begging you - send me what you have that unequivocally shows that participant loans are included in the $46.6 million.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Tuesday, March 03, 2009 11:59 AM
To: Albert, Scott - EBSA
Cc: Auerbach, Michael - EBSA; Dingwall, Ian - EBSA; Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Solis, Hilda - OSEC
Subject: RE: You involvement

For the Record:

Scott;

This email from Ms. Corpus does not include any document to support the statement.

I need documents. Since the beginning of this, all I get is statements.

This is just a statement from a person. I needed document to make this statement valid.

Would you accept an email from somebody telling you that $1 million is in your accout?

Do you want to see a document to prove it?

The document to support the statement of Ms. Corpus if correct is supposed to match the records in my files.

Without the document, this is just another statement.

Jose Castillo

-----Original Message-----
From: Albert, Scott - EBSA
Sent: Tuesday, March 03, 2009 10:40 AM
To: Castillo, Jose - EBSA
Subject: RE: You involvement

The fax you just sent me is the kind of thing I've been asking for all along.  I just the

summary page similar to this one at the end that shows $290,684 total account balance (including participant loans) for all participants as of 12/31/2000.

'm sending you the e-mail and document of reference from NYL in which they say participant loans are not included in the schedule (that presents the $46.6 million). Jonathan has the original e-mail to NYL that includes the schedule attachment.

By the way, yesterday, I've spoken to 3 leading CPAs who audit plans who say treatment of loans varies. There is no standard practice. I'm sending you an example.

The purpose of my questioning whether participant loans are included in the $46.6 million is so I can properly reconcile participant account balances to total plan assets. The argument is that plan assets exceeded participant account balances as of 12/31/2000. Accordingly, there was no shortfall.

I want to make sure this analysis is correct. It's a fair thing to do, and my intention is not to disprove your analysis. If $46.6 million include participant loans, then net assets appear to exceed the account balances.

If loans are not included in the $46.6 million, then loans must be added to the $46.6 million in order to properly reconcile to plan net assets.

Reconciling this is important because the argument when I was brought into this thing is that loans were inappropriately excluded from net assets when reconciling to participant account balances - thus resulting in a calculated shortfall.

I simply need to verify this.

Also, please look at an e-mail from you from 2/26/2009 where you seem to be arguing that loans are not included in participant accounts.

-----Original Message-----
From: Castillo, Jose - EBSA
Sent: Tuesday, March 03, 2009 10:24 AM
To: Albert, Scott - EBSA
Cc: Auerbach, Michael - EBSA; Dingwall, Ian - EBSA
Subject: RE: You involvement

For the record:

Scott,

What exactly the truth you are trying to seek.

The record show that total participants account balance is $46,686,166.

Is the truth you are trying to find is if the $46,696,166 is correct or you have another figure in your mind?

Industry -wide, as comfirmed by my 401(K) cases as well as confirmed by Walter Blonski, the total participants account balance that is carried forward to the following year always include the outstanding loan figure.

What is your purpose of questioning the correctness of this amount?

The issue here is that the $49,497,552 Net Assets Available for Benefits should have been allocated as required.

This did not happen. So, it's a violation.

Jose Castillo
Auditor

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-----Original Message-----
From: Albert, Scott - EBSA
Sent: Monday, March 02, 2009 1:59 PM
To: Castillo, Jose - EBSA
Subject: Re: You involvement

Please call me through my assistant at 202-693-8374 if you'd like to continue our discussion on this.

As I've told you numerous times in our conversations, I'm desperately trying to see your points as they relate to the matter of the loans.

I'm not trying to disprove anything by the way. Just trying to seek the truth.

I'm working at home today.

Scott C. Albert
Chief, Division of Reporting Compliance
US Dept. Of Labor

----- Original Message -----
From: Castillo, Jose - EBSA
To: Albert, Scott - EBSA
Cc: Auerbach, Michael - EBSA; Dingwall, Ian - EBSA; Lebowitz, Alan - EBSA; Smith, Virginia - EBSA; Monhart, Jeff - EBSA; Solis, Hilda - OSEC
Sent: Mon Mar 02 10:49:27 2009
Subject: You involvement

For the Record:

Scott,

The main purpose of your involvement on this case is to make a determination if Loan receivable is considered a plan asset or not.

However, the first thing you did 12/15/2008 is to so-called analyze the correctness of the participants account balances for the purpose of nullifying my ROI that shows total participants account balances is $46,686,166.00.

Scott your main goal in coming here is to try to put doubt on my investigation and not to make a determination if Loan receivable is a plan asset or NOT.

Our office has at least three CPAs that are all investigating ERISA case since at least 2001.

I do not think you have done one since joining EBSA.

You tried to include the $2,756,494 again to that total. By doing this the total would $49,442,660 which my justify the alibi since the net assets available for benefits as of

12/31/2000 is $49,497,552.00.

How could you make such a determination with out reviewing the audit work papers and my whole case file?

Before the meeting, I saw your paper works on the table at the conference room. On top is the UNDOCUMENTED spreadsheet created by James Heinzman 4/5/2007 to explain how plan asset is less than total participants account 12/31/2000 and also to explain how the use of the $381,099 plan asset is not a prohibited transaction.

WHY ARE YOU INTERESTED IN ANALYZING THIS SPREADSHEET????

It was provided to you before you arrived here 12/15/2008.

You have NO document to prove that total participants account balance is $49,442,660.

This total is SOLELY BASED ON YOUR THEORY AND that of somebody named Daphne.

I HAVE ALL THE DOCUMENTS TO PROVE THAT THE TOTAL IS $46,686,166 INCLUDING written STATEMENTS FROM New York Life and verified by statements of S & P auditors and critical documents that are all on my case files that are included as exhibits on my Report of Investigation, Part II.

K With due respect I am now including YOU as another person I am officially complaining as undermining my investigation.

For Mr. Dingwall and Mr. Auerbach, here's my message, if you want to see all the evidence come to New York , we will set down and I will show you all my case files and the whole audit work papers that Scott never saw.

My statements to the OIG and possibly the FBI will include that as a result of the actions of Goldberg and Kay, the disappearance of the $1,401,997 cash that was setting WITH the Bank of New York until the end of 2001 was never investigated. This money could have been easily trace IF THERE WAS A CRIMINAL INVESTIGATION Started IN NOV. 2005.

Remember all the asset should have been transferred in August 2000 from the Bank Of New York to New York Life.

Respectfully and sincerely yours

Jose Castillo
Auditor

Tracking: Recipient Read

| Recipient | Read |
| --- | --- |
| Castillo, Jose - EBSA | Read: 3/3/2009 12:28 PM |