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Please
Docket
09-988

December 7, 2018

Via Facsimile to 267-299-5099

The Honorable Wendy Beetlestone
United States District Court
Eastern District of Pennsylvania
James A Byrne U S Courthouse
601 Market Street, Suite 3809
Philadelphia, PA 19106

Re ***Solis v. Koresko – 09-988-WB – Joint Response Regarding Outstanding Distribution and Taxation Issues***

Dear Judge Beetlestone:

Trustee, Manufacturers and Traders Trust Company, including its Wilmington Trust affiliated entities (“Wilmington Trust”), by and through its counsel Holland & Knight LLP, the Department of Labor (“DOL” or “Department”), on behalf of its client, the Employee Benefits Security Administration (“EBSA”), and Ira Silverstein, on behalf of certain individuals (together, the “Parties”), respectfully submit this Joint Response Regarding Outstanding Distribution and Taxation Issues in the above captioned matter, following the hearing before Your Honor on November 3, 2018 (“Hearing”)

Since the hearing, the Parties have made some progress towards resolving the distribution and taxation issues that remain in this matter. However, Wilmington Trust and the Department disagree on several issues. Each issue is discussed in turn, setting forth Wilmington Trust’s position, the Department’s position and a proposed resolution.

1. Income Tax Withholding and Employee FICA (Cash Distributions)

As the Court is aware, Wilmington Trust was appointed Trustee of the Single Employer Welfare Benefit Plan Trust (“SEWBPT”) and the Regional Employers Assurance League Voluntary Employees’ Beneficiary Association Trust (“Real VEBA”) (collectively the “Trusts”). In its role as Trustee, Wilmington Trust made cash distributions to individuals from August to October 2018 (“Summer 2018 Cash Distributions”). During this time, Wilmington Trust withheld and remitted a total of approximately \$6.69 million to the IRS and state taxing authorities. The \$6.69 million total was comprised of approximately \$5.12 million for income tax withholding, \$834,756.72 for *employee* Federal Insurance Contributions Act (“FICA”) withholdings, and \$733,964.79 for *employer* FICA withholdings.

Three issues stem from the Summer 2018 Cash Distributions: (a) whether Wilmington Trust was required to withhold income tax and employee FICA for the Summer 2018 Cash Distributions; (b) whether the income tax and employee FICA withholdings for the November 2018 Cash Distributions (discussed below) should be treated the same way as the Summer 2018 Cash Distributions (*i.e.*, released and remitted to taxing authorities), and (c) whether Wilmington Trust, as Trustee, had a duty to investigate each of the approximately 400 distributees’ individual tax situations before withholding and remitting income tax and employee FICA to the IRS and state taxing authorities.

a. Income Tax & Employee FICA Withholdings – Summer 2018 Cash Distributions:

Wilmington Trust’s Position Wilmington Trust believes that it properly withheld and remitted the income tax and employee FICA for the Summer 2018 Cash Distributions. Wilmington Trust’s decision to withhold was based on applicable tax law. See *Gluckman v. Comm’r*, 104 T.C.M. (CCH) 651 (T.C. 2012), aff’d, 545 F. App’x 59 (2d Cir. 2013) (holding that taxpayers were required to include in their income the value of two life insurance policies held by purported welfare benefit plan from which their employer withdrew), *see also* *Cadwell v. Comm’r*, 136 T.C. 38, 52-56 (2011), aff’d, 483 F. App’x 847 (4th Cir. 2012) (holding that when a taxpayer has dominion and control over property, the value of such property generally will be included in his or her gross income), *United States v. McKean*, 33 Fed. Cl. 535, 538-39 (1995) (*citing* Rev. Rul. 75-241, 1975-1 C.B. 316 and Rev. Rul. 85-44, 1985-1 C.B. 22) (holding

that cash payments to employees in lieu of nontaxable fringe benefits are subject to income and FICA tax withholding), *In re Amoskeag Bank Shares, Inc.*, 239 B.R. 653, 660 (D.N.H. 1998) (stating that payments made directly to an employee in lieu of health benefits are not exempt from income tax) (citing *McKean* at 539). Further, Wilmington Trust discussed its position on withholdings with Marcum LLP, the Department, as well as Magistrate Hey on multiple occasions prior to making the appropriate withholdings. At no point did Magistrate Hey or any other party associated with the Trusts instruct Wilmington Trust not to withhold, as doing so would require Wilmington Trust not to comply with applicable law.

Pursuant to applicable law the interests of the individuals who received distributions from the Trusts were substantially vested when they gained control of the assets held by the Trusts (i.e., when the distributions were made) and, as such, cash payments were subject to tax. Wilmington Trust was required to withhold and remit the withheld amounts to the IRS and state tax authorities within approximately three days of withholding. See <https://www.irs.gov/businesses/small-businesses-self-employed/employment-tax-due-dates> (stating that under the semiweekly deposit schedule, employment taxes for payments made on Wednesday, Thursday, and/or Friday must be deposited by the following Wednesday. Taxes for payments made on Saturday, Sunday, Monday, and/or Tuesday must be deposited by the following Friday).

DOL's Position: The Department does not take a position on whether the Summer 2018 Cash Distributions are subject to tax or whether and to what extent Wilmington Trust was required to withhold income tax and employee FICA for these distributions.

Wilmington Trust's Proposed Resolution: Wilmington Trust respectfully requests that the Court not object to its determination that it properly withheld and remitted the income tax and employee FICA for the Summer 2018 Cash Distributions to the IRS and state taxing authorities, in accordance with applicable law.

b. Income Tax & Employee FICA Withholdings – November 2018 Cash Distributions:

Following the Hearing, in accordance with the Order signed by Your Honor on November 3, 2018 (the "Order") (Docket #1795), Wilmington Trust made twenty-three (23) additional cash distributions from the Trusts during the week of November 5, 2018 to individuals with an account under one of the Trusts (the "November 2018 Cash Distributions"). Pursuant to

the terms of the Order, Wilmington Trust did not remit to the IRS, nor any state taxing authority, federal and state income tax withholdings, nor employee or employer FICA. These amounts are still held by the Trusts.

Wilmington Trust's Position Consistent with the Summer 2018 Cash Distributions and for the reasons stated above, Wilmington Trust believes the withheld income tax and employee FICA amounts for the November 2018 Cash Distributions should be transmitted to the IRS and appropriate state taxation authorities.

DOL's Position. Consistent with its position regarding the Summer 2018 Cash Distributions, the Department does not take a position on whether the November 2018 Cash Distributions are subject to tax or whether and to what extent Wilmington Trust was required to withhold income tax and employee FICA for these distributions. Because the Department takes no position on these issues, it will not file an objection to Wilmington Trust's representations to the Court that taxes and withholdings apply. However, by taking no position, the Department is not necessarily endorsing or agreeing that taxes apply or that Wilmington Trust made the proper withholdings.

Wilmington Trust's Proposed Resolution Wilmington Trust respectfully requests that the Court permit it to remit the income tax and employee FICA withholdings for the November 2018 Cash Distributions to the IRS and state taxing authorities, in accordance with applicable law.

c. Analysis of Individual Beneficiaries' Tax Situations

The Department asserts that Wilmington Trust had a duty to investigate the personal and financial circumstances of each of the underlying entities and individuals entitled to a distribution from the Trusts. Wilmington Trust determined that such a review was not reasonable or prudent.

Wilmington Trust's Position

Wilmington Trust does not believe it had a duty to investigate each of the individual tax situations of the approximately 400 entities and individuals receiving distributions from the Trusts before withholding and remitting income tax and employee FICA to the IRS and state taxing authorities. In its role as the Trustee, Wilmington Trust was required to function as an employer during the period it made distributions from the Trust. See *Lane Processing Trust v*

United States, 25 F.3d 662, 666 (8th Cir. 1994) (citing *Otte v. United States*, 419 U.S. 43, 50–51, 95 S.Ct. 247, 252–53, 42 L.Ed.2d 212 (1974))

The IRS requires employers and entities that control the payment of wages, and therefore, that function as an employer, to withhold and forward these withholdings to the IRS regardless of an employee's underlying tax situation. See IRS Reg. §31.3402(a)-1(c). This is not controversial – employers regularly withhold taxes from an employee's pay even though an employee may ultimately have no tax obligation to the IRS (i.e., due to deductions, losses, carryovers, expenses, etc.). Instead, the employee must present the additional factors to the IRS on their own and seek a refund of withheld amounts. See *Your Federal Income Tax For Individuals, Tax Guide 2017*, page 13. Wilmington Trust should not be held to a higher standard than any other employer paying compensation to its employees.

Wilmington Trust also believes that Section 77 of the Restatement Third of Trusts ("Restatement") includes the duty of prudence, which "encompasses the duty to exercise reasonable care and skill in trust administration and the duty to act with a degree of caution suitable to the particular trust and its objectives, circumstances, and overall plan of administration." See Restatement (Third) of Trusts § 77. Wilmington Trust believes, because of the complexity associated with reviewing the tax situation of every individual and the amount of time and expenses involved in this task, it would have been imprudent for Wilmington Trust to have engaged in this task, because doing so would have resulted in substantial delays in distributing assets to individuals and would have resulted in additional expenses to the Trusts.

Please also note that, prior to disbursing cash assets, Wilmington Trust was contacted by representatives for nine individual distributees. Wilmington Trust was obligated to speak with these individuals. As a result of these discussions and at the request of the nine individuals, adjustments were made to the accounts of these nine individuals *prior* to the date the distributions were processed.

DOL's Position

The Department takes the position that Wilmington Trust, as trustee, was responsible for investigating the circumstances of the persons receiving distributions to determine the related tax implications so that Wilmington Trust could take the appropriate action in each case. While the Department acknowledges that it cannot determine at this time whether any harm

has resulted or will result from this failure, the Department will continue to assert that Wilmington Trust was responsible for performing this extensive analysis.

It is well established under the common law of trusts, on which ERISA is based, *see Tibble v. Edison*, 135 S.Ct. 1823, 1828 (2015), that the trustee's duty of prudence requires it to apprise itself of the "personal and financial circumstances and concerns or goals of the various beneficiaries" including the "tax positions of the trust and its beneficiaries" *Restatement (Third) of Trusts* § 77 cmt b(1) (2007). Plan fiduciaries are required to investigate the relevant circumstances of the beneficiaries in making plan-related decisions. *See Armstrong v. LaSalle Bank*, 446 F.3d 728, 733-34 (7th Cir. 2006). Therefore, the Department continues to maintain that Wilmington Trust was responsible for investigating the circumstances of persons receiving distributions to determine related tax implications.

At the hearing on November 3, 2018, Doug Marmion testified that Wilmington Trust did in fact undertake such an investigation in some cases, but failed to do so in many others. *See Nov 3, 2018 hearing, Gov Ex F*. Although the Department is not aware of any damages at this time stemming from Wilmington Trust's failure to investigate, the Department takes the position that Wilmington Trust must be surcharged for any harm stemming from this failure.

Wilmington Trusts' Proposed Resolution

Wilmington Trust respectfully requests that the Court determine for the Cash Distributions that it was not required to (i) investigate the underlying tax situation of each entity or individual that received a distribution from the Trusts, (ii) that reprocessing of all previous distributions is not required and/or (iii) it is not necessary for Wilmington Trust to assist entities or individuals in reclaiming any overpaid taxes.

2. Employer FICA / Release Employer FICA to Reimburse Wilmington Trust (Cash Distributions)

a. Employer FICA

The primary issue regarding *employer FICA* is whether the funds used to pay these taxes should come from the Trusts. Based on applicable law, it is clear that taxes should not be paid by Wilmington Trust. As discussed above, *employee FICA* was withheld on the Summer 2018 Cash Distributions and the November 2018 Cash Distributions. *Employer FICA*

was also withheld on the Summer 2018 Cash Distributions and transmitted to the IRS.¹ Employer FICA has not yet been withheld from the November 2018 Cash Distributions

Wilmington Trust's Position: Wilmington Trust believes that the proper source of employer FICA withholdings is the assets of the Trusts. Under established law, where the employer no longer exists, the funds held in the Trust are the proper pool of funds that should be used to satisfy tax obligations. See Private Letter Ruling 201415011, 2014 WL 1399245 (Apr 11, 2014) (concluding that the “[t]rust is required to withhold income tax and the employee portion of the FICA tax on [] wages” and that the “[t]rust must also pay the employer portion of the FICA tax and the FUTA tax”) and “is the employer for purposes of § 3401(d)(1) with respect to these wages”), see also IRS Private Letter Ruling 200808010, 2008 WL 467919 (Feb. 22, 2008) (stating that although the trustees are responsible for determining the amount of benefits due, the trust is liable for paying all of the expenses of all of its constituent plan units), see also *McKean*, 33 Fed Cl at 539 (holding that cash payments to employees in lieu of nontaxable fringe benefits are subject to income and FICA tax withholding), *In re Amoskeag Bank Shares, Inc*, 239 B.R. at 660 (stating that payments made directly to an employee in lieu of health benefits are not exempt from income tax) (citing *McKean* at 539)

However, Wilmington Trust acknowledges that the assets of the Trusts have been allocated on a proportional basis to a book-keeping account held in the name of each entity or individual that has been determined to be eligible for a distribution from the Trusts (the “Accounts”). Wilmington Trust, therefore, asserts the assets of the Trusts, on a proportionate basis for each Account, are the appropriate sources of employer FICA. Wilmington Trust acknowledges, as discussed below, that the employer FICA withholdings for the Summer 2018 Cash Distributions, November 2018 Cash Distributions, and the In-Kind Distributions (discussed below), should be done on a proportional basis and taken from the particular Account triggering the specific withholdings. Wilmington Trust also acknowledges that such withholdings must be tied to the particular Account so that no Account is covering tax withholdings associated with another Account (*i.e.*, another individual’s distributions)

¹ As directed by the Order signed by Your Honor, Wilmington Trust paid to the Trusts \$778,485.70 from Wilmington Trust’s own assets to reimburse the Trusts for the employer FICA Wilmington Trust withheld and transmitted to the IRS following the Summer 2018 Cash Distributions. As discussed in Section 2(b) of this letter, Wilmington Trust believes it should be reimbursed for this amount by the Trusts

To the extent Wilmington Trust did not make the employer FICA distributions on a proportionate basis for any past distributions, if any, Wilmington Trust will do so as part of the “true-up” (discussed below) on the final cash distributions to all of the individuals.

DOL's Position The Department agrees that if the employer FICA withholdings were required (and it neither affirms nor denies this proposition), then the withholdings should have been done on a proportional basis and taken from the Account triggering the specific withholdings. The Department agrees that tax withholdings must be tied to the particular Account so that no individual is covering tax withholdings associated with another Account's distributions.

As such, the Department agrees that the Trusts were the appropriate source of employer FICA, to the extent such withholdings were required (which it neither affirms nor denies). However, the Department notes that Wilmington Trust, as trustee with title to the Trusts' assets, is responsible for properly collecting and remitting the employer FICA in connection with payments from the Trusts. Although the source of the employer FICA withholdings must be drawn on a proportional basis from the Trust assets tied to an Account (as stated above), Wilmington Trust was responsible for undertaking the proper withholdings.

If Wilmington Trust failed to undertake the required collection and payment of taxes relating to any past distributions, the Department takes the position that Wilmington Trust is responsible for covering the tax obligations from its own general assets. The Trusts should not bear the cost of any tax withholding error on the part of Wilmington Trust, with the exception of the November 2018 distributions where withholdings were not done because of a Court order. *See* Order, ECF No. 1795.

Wilmington Trusts' Proposed Resolution Wilmington Trust respectfully requests that the Court not object to it using the assets of the Accounts held under the Trusts as the source of payment for employer FICA obligations. To the extent that Wilmington Trust did not properly calculate proportionate employer FICA withholdings for past distributions to ensure the employer FICA withholding was deducted from the applicable Account, it will make corrections during a “true-up” as part of the final cash distribution to individuals. This so-called “true-up” is simply a reconciliation of the remaining cash in each Account. Wilmington Trust will work with Marcum LLP to determine, prior to the final cash distributions, each Account balance and the applicable employer FICA obligations. To the extent such obligations are owed, the Account will

be reduced for that individual by the amount of the obligation before the individual's remaining cash is distributed. Doing so will ensure that no Account is covering tax withholdings associated with another Account (*i.e.*, another individual's distributions).

DOL's Proposed Resolution. Wilmington Trust is personally liable for paying all taxes in connection with past withholdings that it failed to undertake in prior distributions, with the exception of any withholdings that were not done because of the Court's order, ECF No. 1795.

b. *Release Employer FICA to Reimburse Wilmington Trust*

As directed by the Order signed by Your Honor, Wilmington Trust paid to the Trusts \$778,485.70 from Wilmington Trust's own assets to reimburse the Trusts for the employer FICA Wilmington Trust withheld and transmitted to the IRS following the Summer 2018 Cash Distributions. Wilmington Trust believes it should be reimbursed for this amount by the Trusts.

Wilmington Trust's Position. All employer FICA amounts should be treated the same way. Therefore, if the Trusts are the proper source of employer FICA, as discussed in Section 2(a), Wilmington Trust should be reimbursed by the Trusts for the \$778,485.70 paid from its own assets to comply with the Order.

DOL's Position. The Department's position is that Wilmington Trust withdrew \$778,485.70 from the Trusts' reserve contrary to a Court order. *See* Order, ECF No. 1777. Rather than using the Trusts' reserve to cover employer FICA, Wilmington Trust should have made the withholdings on a proportional basis tied to each Account when making the distribution to the related recipient of the distribution. Because Wilmington Trust failed to do so, and used the Trusts' reserves contrary to a Court order, the Trusts should not be required to return the \$778,485.70 to Wilmington Trust.

Wilmington Trust's Proposed Resolution. If the Court does not object to the proposed resolution regarding employer FICA in Section 2(a) (*i.e.*, that Wilmington Trust may use the proportional assets of each Account as the source of payment for employer FICA obligations), then Wilmington Trust should be reimbursed by the Trusts for the \$778,485.70 paid from its own assets to comply with the Order. However, to the extent Wilmington Trust is deemed liable for any employer FICA amounts following the "true-up", the amount of the reimbursement should be reduced accordingly.

DOL's Proposed Resolution. Wilmington Trust should bear the cost of its error and violation of the Court's order

3. In-Kind Distributions

a. Income Tax & Employee FICA Withholdings

In late 2017 and early 2018, life insurance policies were distributed to sixty-five (65) individuals who held an account under one of the Trusts. No cash was involved and no income tax or FICA amounts were withheld. These so-called "in-kind" distributions ("In-Kind Distributions") present two issues. The first is whether income tax and FICA should have been withheld. The second is whether the proportional assets of the Accounts held for each entity and individual under the Trusts should be used to pay employer FICA obligations.²

Wilmington Trust's Position Wilmington Trust believes that some of the 65 individuals may owe income tax and *employee* FICA for the In-Kind Distributions. This is because the life insurance policies, like the Summer 2018 Cash Distributions and November 2018 Cash Distributions discussed in Sections I(a) and I(b) above, are treated as wages and should be included in income. See *Gluckman v. Comm'r*, 104 T.C.M. (CCH) 651 (T.C. 2012), *aff'd*, 545 F. App'x 59 (2d Cir. 2013) (holding that taxpayers were required to include in their income the value of two life insurance policies held by purported welfare benefit plan from which their employer withdrew), see also *Cadwell v. Comm'r*, 136 T.C. 38, 52-56 (2011), *aff'd*, 483 F. App'x 847 (4th Cir. 2012) (holding that when a taxpayer has dominion and control over property, the value of such property generally will be included in his or her gross income).

However, it is possible that some, if not all, of the 65 individuals may have (i) deductions or basis that would result in zero additional income tax liability, (ii) earned wages in excess of the FICA withholding limits for 2017 and/or 2018 such that they would have zero additional employee FICA liability, (iii) or will pay the applicable income tax due so that withholding is no longer required. Because it is not possible to know these facts at this point, Wilmington Trust believes the best course is for it to engage directly with the 65 individuals, their individual tax advisors, and, if necessary, the IRS to determine whether, and if so, to what extent, they may owe additional income tax liability and/or employee FICA and/or the extent to which these individuals are willing to pay any taxes due. This action is appropriate in this case because

² The second issue is discussed in Section 3(b), below.

no cash was available to satisfy the applicable tax withholdings. Not only is this in the best interests of these 65 individuals, but it also will help to ensure that tax withholdings are only paid by the applicable Account.

Wilmington Trust will help to facilitate this analysis by issuing Form W-2s to the 65 individuals before the January 31, 2019 deadline, along with a letter describing this situation and the proposed course of action. Wilmington Trust will also reach out and engage its contacts at the IRS.

To the extent that Wilmington Trust is able to establish that additional income tax and/or employee FICA liability for an individual is due, Wilmington Trust would like to withhold such amounts during the “true-up” in Section 2(a), above, before final cash distributions are made to individuals. To the extent that an individual does not have enough cash remaining in their Account to satisfy any outstanding income tax and/or employee FICA obligations, Wilmington Trust will work with the individuals and the IRS to amicably resolve the outstanding obligation. In no event will Wilmington Trust use the assets of another Account to satisfy the obligations of any other Account.

DOL's Position Consistent with its position regarding the Summer 2018 Cash Distributions and November 2018 Cash Distributions, the Department does not take a position on whether the In-Kind Distributions are subject to tax or whether and to what extent Wilmington Trust was required to withhold income tax and employee FICA for the In-Kind Distributions.

However, if Wilmington Trust failed to undertake the required collection and payment of taxes relating to any past distributions, the Department takes the position that Wilmington Trust is responsible for covering the tax obligations from its own general assets. The Trusts should not bear the cost of any tax withholding error on the part of Wilmington Trust.

The Department does not agree that the Trusts are the appropriate entities to cover taxes for withholdings that Wilmington Trust failed to undertake. The Trusts are not legal persons with any responsibility. A trust is a legal relationship with respect to the property held by the trustee. See *Barboza v. California Ass'n of Professional Firefighters*, 799 F.3d 1257, 1264 (9th Cir. 2015). As trustee with title to the Trusts' assets, Wilmington Trust was responsible for withholdings in connection with payments from the Trusts. See *Lane Processing Trust v. United States*, 25 F.3d 662, 665-66 (8th Cir. 1994). Doug Marmion already admitted this point when

communicating to plan participants by stating that M&T was required to make employer-related withholdings. *See* Gov. Ex. F. Although the Trusts' assets were the appropriate fund from which to make tax withholdings, when Wilmington Trust failed to take the appropriate withholdings, it became personally responsible as trustee for bearing the cost associated with its failure to perform its duties as trustee.

The assets of the Trusts, which are held for the benefit of employee benefit plans in this case, may not inure to the benefit of any employer. *See* 29 U.S.C. § 1103(c)(1). The term "employer" means any person acting directly as an employer. *See* 29 U.S.C. § 1002(5). In this case, Wilmington Trust is acting as an employer for purposes of the Internal Revenue Code, and under this status as an employer it is precluded from taking any plan assets for its own benefit. Thus, Wilmington Trust may not displace its liability as an employer and trustee responsible for collecting and remitting tax withholdings by taking these amounts from the Trusts' reserve to cover withholdings that it failed to perform.

Wilmington Trust is precluded from using the Trusts' reserve for an additional reason. ERISA imposes on all fiduciaries the duty of loyalty to plan participants. *See* 29 U.S.C. § 1104(a)(1). The scope of this duty under ERISA is based on the common law of trusts. *See Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993). Under the common law of trusts, the duty of loyalty prohibits a fiduciary from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." *Restatement (Third) of Trusts* § 78 (2007). The fiduciary must act with "an eye single to the interests of the [plan] participants and beneficiaries." *Donavan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

As trustee, Wilmington Trust is legally liable to the IRS for failing to make the required withholdings. By attempting to use the Trusts' reserve to eliminate Wilmington Trusts' own liability, it is violating its duty of loyalty by putting its interest ahead of the interests of the plan participants. *See Scott and Ascher on Trusts* § 17.2.3 at 1109 (Wolters Kluwer 5th Ed. 2007). Nor is Wilmington Trust entitled to equitable set-off in these circumstances. *See International Union of Bricklayers v. Gallante*, 912 F. Supp. 695, 705-06 (S.D.N.Y. 1996).

Wilmington Trust's Proposed Resolution. Wilmington Trust respectfully requests that the Court not object to Wilmington Trust's determination that income taxes and FICA withholdings apply to the In-Kind Distributions. Wilmington Trust respectfully requests that the

Court not object to Wilmington Trust's proposal to work with the 65 individuals, their individual tax advisors, and the IRS to determine whether, and if so, to what extent, the individuals may owe additional income tax liability and/or employee FICA for the In-Kind Distributions. To the extent that this investigation reveals additional income tax and/or employee FICA liability for an individual, Wilmington Trust respectfully requests that the Court not object to withholding such amounts during the "true-up" in Section 2(a), above, before final cash distributions are made to individuals. To the extent that an individual does not have enough cash remaining in their Account to satisfy any outstanding income tax and/or employee FICA obligations, Wilmington Trust respectfully requests that the Court not object to it working with the individuals and the IRS to amicably resolve any outstanding obligation(s). Wilmington Trust respectfully requests that the Court further agree that in no event shall Wilmington Trust use another Account to satisfy the obligations of any other Account.

DOL's Proposed Resolution Wilmington Trust is personally liable for paying all taxes in connection with past withholdings that it failed to undertake in prior distributions.

b. Employer FICA Withholdings

Wilmington Trust's Position All employer FICA amounts should be treated the same way. Therefore, if the Trusts are the proper source of employer FICA, as discussed in Section 2(a), Wilmington Trust should be allowed to deduct Employer FICA on the in-kind distributions from the remaining cash distributions as part of the "true-up."

DOL's Position The Department agrees that all FICA amounts should be treated the same way. However, Wilmington Trust is personally liable for paying all taxes in connection with past withholdings that it failed to undertake in prior distributions.

Wilmington Trust's Proposed Resolution As discussed in Section 2(a), above, Wilmington Trust respectfully requests that the Court not object to it using the proportional assets of the Trusts as the source of payment for employer FICA obligations. To the extent that Wilmington Trust did not properly calculate proportionate employer FICA withholdings for past In-Kind Distributions, it will make corrections during a "true-up", as discussed above in Section 2(a), before final cash distributions are made to individuals. Doing so will ensure that no Account is covering tax withholdings associated with another Account.

DOL's Proposed Resolution Wilmington Trust is personally liable for paying all taxes in connection with past withholdings that it failed to undertake in prior distributions.

4. Communication with Companies that Received a Distribution

In late 2017 and early 2018, in accordance with the elections received by Wilmington Trust, certain distributions were made from the Trusts to employers. No tax was withheld from these distributions, but possible negative tax consequences could apply.

Wilmington Trust's Position Wilmington Trust takes the position that the manner in which the assets are used by the employers that received a distribution from the Trusts will determine the tax impact. Code § 4976(a) imposes a 100 percent excise tax on an employer that maintains a welfare benefit fund if there is a disqualified benefit provided during any taxable year. Code § 4976(b)(1)(C) defines "disqualified benefit" to include any portion of a welfare benefit fund reverting to the benefit of the employer. Assets held for a plan and used by an employer to provide permissible benefits, may not be subject to this tax. Further, amounts returned to an employer that were taxed when contributed to the welfare benefit fund will also not give rise to the excise tax.

Wilmington Trust is unable to determine how employers will use the funds or any taxes previously paid by the employers on contributions to the Trust. To address this issue and apprise companies of the possible negative tax consequences associated with a reversion, Wilmington Trust included with distributions made to employers a statement indicating that the employers should confer with their tax advisors to ensure no negative tax consequences arise as a result of the distribution.

Ira Silverstein's (Counsel for Certain Companies and Individuals) Position

Mr. Silverstein contends the original communication provided to employers regarding the possibility of a reversion under the Code was insufficient. Mr. Silverstein asks that all companies that received a distribution from the Trusts be provided with a subsequent communication regarding the possible negative tax consequences and methods to mitigate these consequences.

DOL's Position The Department takes no position.

Proposed Resolution Wilmington Trust proposes to send a follow up letter to the companies that elected to receive a distribution from the Trusts. The letter will be sent

before the end of the year, will describe the possible negative tax consequences of using the distributions received from the Trusts as part of general assets, and will describe how these negative tax consequences can be avoided or mitigated

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Because Wilmington Trust and the Department still disagree on some of the issues, as stated above, the parties agree that they should file briefs addressing the relevant legal points before the Court enters a final order on the disputed issues. The parties propose scheduling a conference call with the Court to determine how best to proceed with a briefing schedule.

Sincerely yours,

/s/ Rachel C. Shum
Rachel C. Shum

/s/ Geoff Forney
Geoffrey Forney

HOLLAND & KNIGHT LLP

U S DEPARTMENT OF LABOR

cc Michael C Driscoll, Wilmington Trust
Cory A Thomas, Holland & Knight