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c/o Douglas J. Wood, Esq.
Reed Smith LLP
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To: JPC Authorizers

Fr: Douglas J. Wood, Elhanan Stone, and Gregory Hessinger

Re: Pension & Health Fund Audits

As you may be aware or have read in the press, on December 8th, the U.S. District Court for the Central District of California rejected an attempt by the Screen Actors Guild (SAG) to overturn an arbitration award secured by the JPC against SAG that disputes on allocations in celebrity endorsement contracts must be resolved by negotiations and arbitration under the collective bargaining agreement with SAG and not under threats of litigation by the SAG Pension & Health Fund Trustees (Plan Trustees) under the ERISA laws.

The purpose of this memo is to clarify, through an FAQ format, what the rulings mean and to provide JPC authorizers with options to explore with their legal counsel should the SAG Plans insist on challenging or seeking to negotiate allocations despite the arbitration award and district court order. We recommend that you consult with your legal counsel before undertaking any specific action.

Q: Why is the arbitration award and district court order important to JPC authorizers?

A: For nearly thirty years, the SAG Plans have taken it upon themselves to challenge allocations between covered and non-covered services in celebrity endorsement contracts despite the fact that they had no authority to do so under the collective bargaining agreement the industry negotiated with SAG or under the SAG Plans' enabling documents. Earlier this year, the SAG Plans, over the JPC's objection, issued guidelines that would have substantially raised the amounts authorizers paid to the SAG Plans. The JPC requested that SAG negotiate with the JPC on any matters relating to guidelines or how allocation disputes should be resolved. SAG refused to do so. The JPC therefore brought an arbitration against SAG and succeeded in obtaining an award that confirmed the JPC's view that the SAG Plans had no authority to negotiate allocations and that disputes with respect to allocations were governed by the collective bargaining agreement between SAG and the authorizers with any impasse being resolved through arbitration, not litigation by the SAG Plans. As determined by the arbitrator and the district court, no longer can the SAG Plans use the threat of the draconian remedies in federal pension law to extract settlements from authorizers for more than the authorizers feel appropriate. According to both the arbitrator and the district court, SAG, and not the SAG Plans, must negotiate with authorizers and if no agreement can be reach, resolve differences through arbitration where the threats of federal pension law remedies are inapplicable. This results in an even playing field and allows the industry to potentially save millions in contributions previously paid to the SAG Funds.

Q: SAG has appealed the order of the district court. Does that mean the SAG Funds can continue to challenge allocations?

A: No. While SAG has appealed the district court decision to the 9th Circuit Court of Appeals, the appeal does not stay the arbitrator's or the district court's decision. All disputes with regard to allocations between covered and non-covered services must be resolved with SAG through negotiation and, if necessary, arbitration and not with the SAG Plans, its auditors, or its attorneys. The JPC believes that the appeal is without merit. The JPC will defend both the arbitration and district court awards vigorously. But most importantly, the filing of the appeal does not change or stay the arbitrator's award or the district court's order. The proper procedure to resolve disputes over allocations lies exclusively with SAG and the authorizer, not the SAG Plans.

Q: Do the arbitration and district court wins mean we don't have to provide copies of contracts and other paperwork to the SAG Plan's auditors any longer?

A: No. It is important to remember that the arbitration and district court opinion are limited solely to disputes over allocations, i.e., the division of gross compensation paid an actor between covered and non-covered services. The Plans continue to have a right to audit books and records of authorizers to determine if required payments have been made by an authorizer to the Plans. The Plans can no longer, however, argue whether the allocation between covered and non-covered services was correct. The Plans are bound by whatever allocation appears in a contract. Only SAG, not the Plans, can challenge the division between covered and non-covered services.

Q: What should we do if the SAG Plans insist they're not bound by the arbitration award or district court order?

A: Refer any denials to your legal counsel and inform JPC lead negotiator, Douglas Wood. Your legal counsel can address the position with the SAG Plans. It is the JPC's opinion, however, that the SAG Plans are bound by the arbitration award and district court order. Any other construction is contrary to both the collective bargaining agreement with SAG and the SAG Plan's enabling documents.

Q: What should we do if we're sued by the SAG Plans over an allocation?

A: Immediately refer the matter to your legal counsel and inform JPC lead negotiator, Douglas Wood. The JPC believes a court should, on motion by the authorizer, dismiss any such case and instruct the Plans to either accept the allocation in a contract or refer the matter to SAG for negotiation or arbitration between SAG and the authorizer.

Q: If we're currently in an audit or receive an audit request, is there anything formal we should include in our responses that relates to the arbitration, the district court order, or any other pending proceedings?

A: While you should consult with your legal counsel before making any response to the SAG Plans auditors, the JPC believes you should include two formal statements. First, you should point out that the submission of documents responsive to the audit request does not mean you are prepared to discuss the allocation between covered and non-covered services. Your communication should specifically state that as far as you are concerned, the SAG Plans have no authority to challenge the allocations and that you will not engage in any negotiations with the SAG Plans over allocations. Second, you may want to consider reserving your rights, if any, with respect to the arguments pending in two independent cases involving the SAG Plans – the so-called Taylor Made and Callaway cases. In these two cases, the advertisers have argued, among other things, that the celebrity who appeared in their commercials was not an “employee”

within the definition contained in pension plan law. If the advertisers prevail on their arguments, then it's possible that no pension and health fund contributions are required on any of the compensation paid to the celebrity.

Q: If SAG does file an arbitration challenging an allocation, how will that arbitration be resolved?

A: At present, there are no guidelines other than the general procedural rules of the American Arbitration Association. The JPC has invited SAG to discuss how negotiations and arbitrations over an allocation should be conducted, but SAG has not accepted that invitation. Until the JPC and SAG negotiate a process, there are no established rules as to how a specific allocation should be determined and disagreements resolved.

Q: What about AFTRA? Is AFTRA bound by the rulings?

A: Since AFTRA was not a party in either the arbitration or district court proceeding, they are not legally bound by the rulings. The terms and conditions of the collective bargaining agreement with AFTRA and the enabling documents of the AFTRA Funds, however, are essentially identical to the SAG and SAG Plans that were adjudicated in the arbitration and district court case with SAG. The JPC has therefore notified AFTRA that the JPC believes AFTRA should comply with the rulings and that the JPC is ready and willing to meet with AFTRA to negotiate an appropriate manner in which to deal with handling disputes and arbitrations over allocations. Should AFTRA fail to meet with the JPC, then the JPC would have to decide whether to take AFTRA to arbitration as it successfully did with SAG.

Should you have any other questions, please feel free to call or write the JPC's lead negotiator, Douglas Wood at 212 549 0377 or dwood@reedsmith.com.