

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

MADELINE REED, RONALD SUMTER,
STEPHANIE PEMBERTON, and CYNTHIA
SPENCE, on behalf of themselves and all
other similarly situated pension plan
participants, and on behalf of the J-CAP
PENSION PLAN

Plaintiffs,

v.

QUEENS VILLAGE COMMITTEE FOR
MENTAL HEALTH FOR JAMAICA
COMMUNITY ADOLESCENT PROGRAM,
INC., Plan Administrator, The J-Cap Pension
Plan; DIANE GONZALEZ, NANCY
BRINN, and NILDA RUIZ, Fiduciaries, The
J-Cap Pension Plan; DELAWARE
CHARTER GUARANTY AND TRUST
COMPANY, d/b/a Principal Trust Company,

Defendants.

Case No.: 1:18-cv-3114-AMD-JO

**DEFENDANT DELAWARE CHARTER GUARANTY AND TRUST COMPANY, D/B/A
PRINCIPAL TRUST COMPANY'S ANSWER TO PLAINTIFFS' FIRST AMENDED
CLASS ACTION COMPLAINT AND ASSERTION OF CROSS-CLAIMS**

Defendant Delaware Charter Guaranty and Trust Company, d/b/a Principal Trust Company ("Principal"), respectfully submits this answer and affirmative defenses to Plaintiffs' First Amended Class Action Complaint, Dkt. No. 21 (the "Amended Complaint"). Principal denies each and every allegation contained in the Amended Complaint, except as specifically admitted herein, and any factual averment admitted herein is admitted only as to the specific facts and not as to any conclusions, arguments, or characterizations which are contained in any averment or in the Amended Complaint as a whole. To the extent the Amended Complaint

contains headings or other material that is inappropriate under Rule 8 and Rule 12(f) of the Federal Rules of Civil Procedure, no response to such material is required. If, however, a response is required, Principal denies all headings in the Amended Complaint, unless specifically admitted herein.

Principal answers the specific allegations in the Amended Complaint as follows, and the foregoing statements are incorporated into each numbered paragraph of this answer:

PRELIMINARY STATEMENT

1. Plaintiffs' claims arise under ERISA, 29 U.S.C. § 1001 et seq. The plaintiffs are participants in the defined contribution pension plan (pension plan), that their employer, the Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc. (Queens Village), sponsored for its employees. Queens Village also is the plan's administrator and named fiduciary.

ANSWER: Principal states that the allegations in Paragraph 1 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 1 and, on that basis, denies them.

2. Queens Village states that it is a non-profit 501(c)(3) corporation primarily engaged in residential treatment programs in Jamaica, New York, for the treatment of drug and alcohol abusers. Queens Village acquired land and constructed a residential treatment facility in Jamaica, Queens.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 2 and, on that basis, denies them.

3. Queens Village receives funds in the form of grants from the New York State Office of Alcohol and Substance Abuse Services (OASAS), its main funding source. Queens Village also receives revenue from welfare, other governmental agencies, private contributions,

and from other sources.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 3 and, on that basis, denies them.

4. For the 2008-2010 pension plan years, the terms of the pension plan required Queens Village to contribute 7% of each participant's compensation (up to the social security earnings limit, and a higher percent of compensation for earnings above that limit) with Queens Village into the pension plan on their behalf, to be allocated to their individual accounts. The OASAS grant provides some or all of the funding for the pension plan contributions that Queens Village estimated it would have to make each year.

ANSWER: Principal states that the allegations in Paragraph 4 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 4 and, on that basis, denies them.

5. Queens Village failed to make all or almost all of its required contributions into the pension plan for the 2008-2010 pension plan years. For each of those plan years, Queens Village was required to contribute approximately \$200,000 per year into the plan. For subsequent plan years through at least the 2016 plan year, on information and belief, Queens Village failed to contribute the amount it was required by the terms of the plan, and by law, to contribute into the plan for that plan year.

ANSWER: Principal states that the allegations in Paragraph 5 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 5 and, on that basis, denies them.

6. On the pension plan's annual report to the U.S. Department of Labor (Form 5500 SF) for the 2009 plan year and for all subsequent pension plan years, Queens Village concealed its failure to make those required contributions. The instructions for completing the annual report

stated that contributions not made in one year had to be included as a required contribution on the report for the next plan year. The requirement carried over until the money was paid into the pension plan.

ANSWER: Principal states that the allegations in Paragraph 6 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 6 and, on that basis, denies them.

7. On the 5500 SF annual report for the 2009 plan year and for all subsequent plan years, Queens Village failed to list the contributions not made for any prior year as a required contribution in each subsequent year. In each of those plan years, participants eligible for a contribution did not receive the amounts that should have been allocated to their accounts, as well as the earnings that timely contributions would have produced for their accounts.

ANSWER: Principal states that the allegations in Paragraph 7 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 7 and, on that basis, denies them.

8. For some plan years after the 2010 plan year, Queens Village also failed to provide the Trustee, Delaware Charter Guaranty and Trust Co., conducting business as Principal Trust Co. (“Principal”) with the information necessary to allow Principal to allocate any money contributed into the pension plan into the appropriate accounts in the plan, causing participants to lose contributions and earnings.

ANSWER: Principal states that the allegations in Paragraph 8 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 8 and, on that basis, denies them.

9. Queens Village owed the pension plan a debt for failing to make its contractually

required pension plan contributions. The pension plan's right to collect on that debt, a "chase in action," is an asset of the pension plan. Rahm v. Halpin, 566 F.3d 286, 291 (2d Cir. 2009). When an employer fails to pay contributions into a plan and the plan's fiduciaries do not pursue the claim, the Secretary of Labor generally files suit against the plan's fiduciaries for failing to enforce the plan's rights against the employer. Id., at 289-90.

ANSWER: Principal states that the allegations in Paragraph 9 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the Second Circuit issued a decision in *Rahm v. Halpin*, which decision speaks for itself, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 9 and, on that basis, denies them.

10. Principal met with Queens Village and the three individually named fiduciaries at some point after contributions were due for the 2010 plan year in 2012. After learning that Queens Village would not be enforcing the plan's right to payment for the unpaid contributions for the 2008-2010 plan years, Principal failed to alert the plan participants that Queens Village had no intention of enforcing the plan's right to payment of the unpaid contributions.

ANSWER: Principal denies the allegations in Paragraph 10.

11. The Queens Village financial statements for its fiscal year ending on June 30, 2016, state that Queens Village paid off the mortgage on the building or buildings in which it operates the residential treatment facility, that it took out in 1998. On or about March 16, 2016, the Office of the City Register of the City of New York recorded a Satisfaction of Mortgage document, stating that as of February 29, 2016, Queens Village had satisfied its mortgage on the entire lot and building at 116-30 Sutphin Boulevard, Queens, New York. This land and the building are worth millions of dollars.

ANSWER: Principal states that the allegations in Paragraph 11 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set

forth in Paragraph 11 and, on that basis, denies them.

12. By early 2016, at the latest, Queens Village had assets available to pay or secure the payment of the money that it owed the pension plan. When Queens Village continued to fail to enforce the plan's right to payment, a co-fiduciary with respect to the J-CAP Pension Plan, Principal, then failed to bring a civil action against named fiduciary Queens Village for failing to enforce the plan's right to payment of the unpaid contributions, to recover the plan's loss.

Queens Village had and has assets from which the plan's loss could be recovered.

ANSWER: Principal admits that it did not bring a civil action against Queens Village, but otherwise states that the allegations in Paragraph 12 represent legal conclusions as to which no response is required; if a response is required, Principal denies that it was a co-fiduciary to the J-CAP Pension Plan with respect to Queens Village's contributions, and states that it lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 12 and, on that basis, denies them.

13. This civil action is brought by the named plaintiffs on behalf of themselves and all participants (and their beneficiaries and estates) in the pension plan eligible for a contribution during any plan year starting in the 2008 plan year and through and including the 2016 pension plan year (on information and belief, the most recent plan year for which the due date for the employer's contributions has passed) for which a contribution is due and has not been fully paid (with all lost earnings), and on behalf of the pension plan itself, against the plan's administrator and named fiduciary, the Queens Village Committee for Mental Health, and plan fiduciaries Diane Gonzalez, Nancy Brinn and Nilda Ruiz, and against Principal, the Plan trustee.

ANSWER: Principal states that the summary of the instant lawsuit in Paragraph 13 does not represent factual allegations to which a response is required; if a response is required, Principal admits that the named plaintiffs have brought this lawsuit, and states that the First Amended Complaint speaks for itself, but Principal otherwise denies the allegations therein, except as explicitly admitted in this Answer.

14. ERISA section 502(a)(2), 29 U.S.C. §1132(a)(2), authorizes this action by the participants in a representative capacity against the plan fiduciaries. L.I. Head Start Child

Development Services, Inc. v. Economic Opportunity Council of Suffolk, Inc., 710 F.3d 57, 65-66 (2d Cir. 2013). The action by the participants for breach of fiduciary duty directly against named fiduciary Queens Village and plan fiduciaries Gonzalez, Brinn and Ruiz is authorized by ERISA section 502(a)(3), 29 U.S.C. §1132(a)(3). The claim against Principal, for co-fiduciary liability, is authorized by ERISA section 405(a), 29 U.S.C. §1105(a), and enforced through ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). That co-fiduciary liability applies to any co-fiduciary which has actual knowledge of a breach of fiduciary duty by another fiduciary and fails to take reasonable steps to remedy the breach, and the other fiduciary had assets available from which any portion of the unpaid funds could be recovered. Silverman v. Mutual Benefit Life Insurance Co., 138 F.3d 98, and at 105 (2d Cir. 1998)((Jacobs and Meskill, concurring).

ANSWER: Principal states that the allegations in Paragraph 14 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the Second Circuit issued the decisions cited in Paragraph 14, which decisions speak for themselves, but Principal denies that ERISA authorizes a cause of action against it for co-fiduciary liability, and states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 14 and, on that basis, denies them.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1). This is a complaint by pension plan participants alleging violations by pension plan fiduciaries of provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (“ERISA”).

ANSWER: Principal states that the allegations in Paragraph 15 represent legal conclusions as to which no response is required; if a response is required, Principal admits that ERISA provides for federal question jurisdiction, but denies that this Court has subject matter jurisdiction under Article III of the United States Constitution.

16. Venue is proper in this district, under ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2). The Queens Village Committee for Mental Health operates the in-patient care

facility at 116-30 Sutphin Blvd., Jamaica, New York 11434-1527, in this district; the Queens Village Committee is listed in the Pension Plan's Summary Plan Description as the Pension Plan Administrator, at this address, and the participants were employed at this address. Breaches of fiduciary duty are alleged to have occurred in this district.

ANSWER: Principal states that the allegations in Paragraph 16 represent legal conclusions as to which no response is required; if a response is required, Principal admits that venue is proper in this district, but states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 16 and, on that basis, denies them.

THE PARTIES

17. Plaintiff Madeline Reed was employed by Queens Village from 2004 through October, 2007 and then again from March, 2008 through December, 2015. She was employed first as an administrative assistant and then as a counselor to people with alcohol or drug addiction problems. She is a vested participant in the pension plan. She was entitled to a contribution to her account in the pension plan for each of the 2008-2014 plan years for her service with Queens Village during these years. She did not receive a contribution to her account in the plan for the 2008-2010 plan years, and did not receive the amount required to have been contributed to her account for the subsequent plan years.

ANSWER: Principal states that the allegations in Paragraph 17 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 17 and, on that basis, denies them.

18. Plaintiff Ronald Sumter worked approximately 20 years for Queens Village, from 1993 through August, 2014. He was employed as a counselor to people with alcohol or drug addiction problems. He is a vested participant in the pension plan. He was entitled to a contribution to his account in the pension plan for each of the 2008-2013 plan years for his

service with Queens Village during those years. He did not receive the amounts required to have been contributed to his account for all or almost all of these plan years.

ANSWER: Principal states that the allegations in Paragraph 18 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 18 and, on that basis, denies them.

19. Plaintiff Stephanie Pemberton was employed by Queens Village as a counselor, and worked there from approximately 1996 through 2014. She was vested in her benefits in the pension plan and was entitled to a contribution to her account for the 2008-2013 plan years for her service with Queens Village during those years. She did not receive the amounts required to have been contributed to her account for all or almost all of these plan years.

ANSWER: Principal states that the allegations in Paragraph 19 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 19 and, on that basis, denies them.

20. Plaintiff Cynthia Spence was employed by Queens Village as a food service supervisor, and worked there from November, 1996 through June, 2018. She was vested in her benefits in the pension plan and was entitled to a contribution to her account for each plan year from the 2008 plan year through the 2016 plan year for her service with Queens Village during those years. She did not received any contribution to her account in the plan for the 2008-2010 plan years, and did not receive the amounts required to have been contributed to her account for all or almost all of the subsequent plan years.

ANSWER: Principal states that the allegations in Paragraph 20 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to

admit the truth of the remainder of the allegations set forth in Paragraph 20 and, on that basis, denies them.

21. The J-CAP Pension Plan is an employee pension benefit plan, within the meaning of ERISA section 3(2)(A), 29 U.S.C. §1002 (2)(A), and a defined contribution pension plan within the meaning of ERISA section 3(34), 29 U.S.C. §1002 (34).

ANSWER: Principal states that the allegations in Paragraph 21 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the J-CAP Pension Plan is an ERISA-governed plan.

22. Defendant Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc. (Queens Village) is a 501(c)(3) non-profit corporation engaged primarily in residential treatment programs using the therapeutic community model to treat drug and alcohol abuses in Queens County, New York. Queens Village's primary place of business is at 116-30 Sutphin Blvd., Jamaica, New York 11434-1527.

ANSWER: Principal states that the allegations in Paragraph 22 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 22 and, on that basis, denies them.

23. Queens Village sponsors the J-Cap Pension Plan, an employee pension benefit plan within the meaning of ERISA section 3(2)(A), 29 U.S.C. §1002(2)(A), for its employees. The plan's summary plan description (SPD) states that Queens Village is the plan administrator, within the meaning of ERISA section 3(16)(A), 29 U.S.C. §1002 (16)(A); is responsible for directly administering the plan, and is responsible for the day-to-day administration and management of the plan. Queens Village has the discretionary authority to appoint other persons as may be necessary to act on its behalf or assist it in performing these responsibilities. Queens Village is the named fiduciary of the pension plan, within the meaning of ERISA section 402(a)(2), 29 U.S.C. § 1102(a)(2).

ANSWER: Principal states that the allegations in Paragraph 23 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the J-CAP Pension Plan is an ERISA-governed plan and has a summary plan description, which document speaks for itself, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 23 and, on that basis, denies them.

24. Defendant Diane Gonzalez is and has been, at all pertinent times, the Chief Executive Officer of Queens Village. As chief executive, she is responsible for supervising the management, administration and operation of the organization, and has the authority to manage the finances of the organization.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 24 and, on that basis, denies them.

25. Diane Gonzalez exercises authority and control over the pension plan asset consisting of the plan's chose in action (its right to payment of the debt that Queens Village owed the pension plan for the unpaid mandatory contributions).

ANSWER: Principal states that the allegations in Paragraph 25 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 25 and, on that basis, denies them.

26. As chief executive, Gonzalez has the authority to determine and control, among other matters, whether and under what circumstances Queens Village, in its capacity as pension plan administrator and named fiduciary of the plan would manage or dispose of the plan asset consisting of its chose in action for the unpaid contributions by:

- a. seeking to collect on the debt owed to the plan by employer-plan sponsor Queens Village for its unpaid contributions to the pension plan;
- b. applying to a federal court for guidance on collecting the unpaid pension plan contributions; and

c. providing information to the plan trustee necessary for the plan trustee to determine how employer contributions to the pension plan should be allocated to the participants' individual accounts in the plan.

ANSWER: Principal states that the allegations in Paragraph 26 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 26 and, on that basis, denies them.

27. Diane Gonzalez exercises control over whether conflicted fiduciary Queens Village applies to a federal court for guidance as to how it should exercise its fiduciary duty to collect on the debt that plan sponsor Queens Village, in its corporate capacity, owes the pension plan for the unpaid contributions and lost earnings.

ANSWER: Principal states that the allegations in Paragraph 27 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 27 and, on that basis, denies them.

28. Diane Gonzalez has the authority, as chief executive officer of Queens Village, to determine which of Queens Village's creditors would be paid and in what order, and whether fiduciary Queens Village, at any time, would seek to enforce the plan's chose in action against Queens Village in its corporate capacity. She has the authority and responsibility to decide whether and under what circumstances Queens Village should obtain a mortgage on its real property in order to obtain the cash necessary for Queens Village to pay the debt it owes the pension plan for the unpaid contributions and earnings lost by the participants on the unpaid contributions.

ANSWER: Principal states that the allegations in Paragraph 28 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 28 and, on that basis, denies them.

29. Diane Gonzalez exercises discretionary authority or discretionary control respecting management of the pension plan in that she has the authority to determine the

information that is provided to the plan trustee so that the trustee can allocate the yearly Queens Village contributions to the pension plan into the appropriate participant accounts in the plan.

ANSWER: Principal states that the allegations in Paragraph 29 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 29 and, on that basis, denies them.

30. Diane Gonzalez is a fiduciary of the pension plan, within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

ANSWER: Principal states that the allegations in Paragraph 30 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 30 and, on that basis, denies them.

31. Defendant Nancy Brinn is the Chief Operating Officer of Queens Village. On the 2002 Summary Plan Description, she is listed as a plan trustee, along with Thomas White, Jr.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 31 and, on that basis, denies them.

32. On behalf of Queens Village in its capacity as Pension Plan Administrator, Brinn signed and submitted the pension plan administrator's annual 5500 SF forms for the July 1, 2009-June 30, 2010 plan year and for the July 1, 2010-June 30, 2011 plan year

ANSWER: Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 32 and, on that basis, denies them.

33. In filling out line 12(b) on the Form 5500 SF, Brinn failed to follow the directions which stated, in pertinent part: "If there is an accumulated funding deficiency for a prior year that has not been waived, that amount should also be included as part of the contribution required for the current year." In not including the accumulated funding deficiency on the 5500 SF forms for the 2009 and 2010 plan years, Brinn and Queens Village concealed the failure by Queens

Village to make the mandatory contributions for the pension plan years ending on June 30, 2009 and June 30, 2010.

ANSWER: Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 33 and, on that basis, denies them.

34. In concealing that Queens Village had a debt for unpaid past required contributions to the plan, Brinn and Queens Village thereby concealed the plan asset consisting of the plan's chose in action (its right to collect the unpaid contributions) from plan participants. Brinn exercised authority and control over the pension plan asset consisting of the plan's chose in action (its right to payment of the debt that Queens Village owed the pension plan for the unpaid mandatory contributions).

ANSWER: Principal states that the allegations in Paragraph 34 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 34 and, on that basis, denies them.

35. Nancy Brinn exercised discretionary authority or discretionary control respecting management of the pension plan in concealing the failure of Queens Village to make its mandatory contributions to the pension plan on behalf of the pension plan's participants for the 2008-2010 plan years. Nancy Brinn is a fiduciary, within the meaning of ERISA section 3(21)(A), 29 U.S.C. §1002(21)(A), of the pension plan.

ANSWER: Principal states that the allegations in Paragraph 35 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 35 and, on that basis, denies them.

36. Defendant Nilda Ruiz is and has been, at pertinent times, the Chief Financial Officer of Queens Village. On behalf of Queens Village in its capacity as Pension Plan Administrator, she signed and submitted the annual reports of the pension plan on Form 5500

SF, to the U.S. Department of Labor, for the plan year ending on June 30, 2012, through the plan year ending on June 30, 2017. She had the authority to fill out and sign the forms on behalf of plan administrator Queens Village.

ANSWER: Principal states that the allegations in Paragraph 36 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 36 and, on that basis, denies them.

37. In filling out line 12(b) on the Form 5500 SF, Ruiz failed to follow the directions which stated, in pertinent part: “If there is an accumulated funding deficiency for a prior year that has not been waived, that amount should also be included as part of the contribution required for the current year.”

ANSWER: Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 37 and, on that basis, denies them.

38. On the 5500 SF forms filed with the Department of Labor that she signed, Ruiz did not reveal, and concealed that the Queens Village mandatory contributions to the pension plan for the plan years ending on June 30, 2009, 2010 and 2011 had not been made. In concealing that Queens Village had a debt for unpaid past required contributions to the plan, Ruiz and Queens Village thereby concealed the plan asset consisting of the plan’s chose in action (its right to collect the unpaid contributions) from plan participants. Ruiz exercises authority and control over the pension plan asset consisting of the plan’s chose in action (its right to payment of the debt that Queens Village owed the pension plan for the unpaid mandatory contributions).

ANSWER: Principal states that the allegations in Paragraph 38 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks

knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 38 and, on that basis, denies them.

39. Ruiz exercised discretionary authority or discretionary control respecting management of the pension plan in concealing the failure of Queens Village to make its mandatory contributions to the pension plan on behalf of the pension plan's participants for the 2008-2010 plan years. Nilda Ruiz is a fiduciary, within the meaning of ERISA section 3(21)(A), 29 U.S.C. §1002(21)(A), of the pension plan.

ANSWER: Principal states that the allegations in Paragraph 39 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 39 and, on that basis, denies them.

40. On information and belief, prior to filing these 5500 forms for the plan years ending on June 30, 2012 through June 30, 2017, Nilda Ruiz, Diane Gonzalez and Nancy Brinn all were aware of this requirement that accumulated funding deficiencies for any plan year had to be set forth as required contributions in the 5500 SF filed for the subsequent year, and all were aware that the accumulated funding deficiencies were not being listed. Gonzalez had the authority to direct Ruiz to include the cumulative funding deficiency on line 12(b) of the 5500 SF forms, but did not do so.

ANSWER: Principal states that the allegations in Paragraph 40 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 40 and, on that basis, denies them.

41. Employer contributions to the pension plan are sent to and held by the Plan trustee, Defendant Delaware Charter Guaranty and Trust Co. (Principal), in a trust fund. In a motion to dismiss (Doc. 32) filed in the related action in this court, Stokes, et al. v. Queens Village Committee for Mental Health for J-CAP, Inc., et al., No. 18-cv-3305 (EDNY), Principal admitted that it is a fiduciary of the J-CAP pension plan. Principal is a fiduciary, within the

meaning of ERISA section 3(21)(A), 29 U.S.C. §1002(21)(A), of the pension plan, and a co-fiduciary, within the meaning of ERISA section 405(a), 29 U.S.C. § 1105(a), of named fiduciary Queens Village.

ANSWER: Principal states that the allegations in Paragraph 41 represent legal conclusions as to which no response is required; if a response is required, Principal admits that it served as a directed trustee for the limited purposes set forth in the applicable directed trust agreements, which documents speak for themselves. Principal denies that it had any responsibilities under ERISA, whether as a fiduciary, co-fiduciary or otherwise, other than those set forth in the applicable directed trust agreements, and states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 41, and, on that basis denies them.

ALLEGATIONS OF FACT

42. Queens Village established its defined contribution pension plan for its employees in 1980.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 42 and, on that basis, denies them.

43. The 2002 pension plan summary plan description (SPD) states that a person is eligible to participate in the pension plan after completing one year of service for Queens Village and attaining the age of 21.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 43 and, on that basis, denies them.

44. That 2002 SPD states, in SECTION THREE:

Each year you are eligible to receive an Employer Contribution, QUEENS VILLAGE COMMITTEE FOR MENTAL HEALTH FOR J-CAP, INC. will contribute an amount equal to 7% of your Compensation up to the Taxable Wage Base, plus an amount equal to 5.7% of your Compensation above the Taxable Wage Base.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 44 and, on that basis, denies them.

45. The Queens Village fiscal year started on July 1st and ended on June 30th. The pension plan similarly used a plan year which started on July 1 and ended on June 30th.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 45 and, on that basis, denies them.

46. The Queens Village audited financial statements provide that for the fiscal year of July 1, 2007-June 30, 2008, the Queens Village pension plan contribution expense was \$202,851. For the fiscal year ending on June 30, 2009 (the 2008 plan year), that expense was \$216,057. No contribution has been made to the plan for that 2008 plan year.

ANSWER: Principal admits that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 46 and, on that basis, denies them.

47. The pension plan's form 5500 SF, for the 2009 pension plan year ending June 30, 2010, stated that the Queens Village required contribution for that year was \$212,193. That contribution was not made, and has never been made. On Line 12(b) of that form, which lists the required contribution for that plan year, Queens Village was required to include the amount that it was required to, but did not, contribute for the 2008 plan year. Queens Village did not do so.

ANSWER: Principal states that the allegations in Paragraph 47 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, and that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 47 and, on that basis, denies them.

48. Line 12(b) of the pension plan's form 5500 SF, for the 2010 pension plan year ending June 30, 2011, stated that the Queens Village required contribution for that year was \$187,000. That contribution was not made, and has never been made. Line 12(b) was required to have included the \$212,193 that had been required to have been made for the 2009 pension plan year ending on June 30, 2010, but which had not been made, and the amount that Queens Village had been required to contribute for the 2008 plan year, but did not.

ANSWER: Principal states that the allegations in Paragraph 48 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, and that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 48 and, on that basis, denies them.

49. Queens Village failed to make the contributions to the pension plan for each of the 2008, 2009 and 2010 pension plan years, that were required by the terms of the pension plan.

ANSWER: Principal states that the allegations in Paragraph 49 represent legal conclusions as to which no response is required; if a response is required, Principal admits Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 49 and, on that basis, denies them.

50. Effective for the pension plan year starting on July 1, 2011, the pension plan was amended to reduce the employer's contribution percentage from 7% to 1%.

ANSWER: Principal states that the allegations in Paragraph 50 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 50 and, on that basis, denies them.

51. Line 12(b) of the pension plan's Form 5500 SF for the 2011 pension plan year ending on June 30, 2012 stated that the contribution required for that plan year was \$32,063. Line 12(b) was required to include the amounts of the contributions that Queens Village was obligated to make for the 2008-2010 pension plan years, but which had not been made. Line 12(b) did not include those amounts.

ANSWER: Principal states that the allegations in Paragraph 51 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, and that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 51 and, on that basis, denies them.

52. Similarly, for all 5500 SF forms subsequently filed to the present, for the 2012 plan years to the most recently filed Form 5500SF, the amount filled in as the required employer contribution for that plan year did not include the amounts that had been previously required to have been contributed, but which had not been contributed, into the pension trust.

ANSWER: Principal states that the allegations in Paragraph 52 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, and that Queens Village did not make contributions to the pension plan during certain years, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 52 and, on that basis, denies them.

53. As pension plan administrator and named fiduciary, Queens Village has had a continuing obligation to enforce the plan's right to payment of the amount owed the plan by Queens Village in its capacity as plan sponsor and employer.

ANSWER: Principal states that the allegations in Paragraph 53 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 53 and, on that basis, denies them.

54. Queens Village has a continuing conflict of interest in determining whether to enforce the debt against itself. As a named fiduciary with a conflict of interest, Queens Village acted in its own self-interest in failing to seek independent advice from a court as to its obligation to enforce debt which it owed, in its capacity as employer and plan sponsor, to the pension plan. As the person who controlled the day-to-day actions of Queens Village, Gonzalez also had a conflict of interest in determining whether to enforce the plan's chose in action for the debt that she wanted to conceal from the plan participants, because she had used the money for other corporate purposes. Gonzalez acted in her own self interest in failing to seek independent advice from a court as to the obligation of Queens Village to enforce the plan's right to payment of the money that it was owed by Queens Village.

ANSWER: Principal states that the allegations in Paragraph 54 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 54 and, on that basis, denies them.

The Queens Village Financial Statements

55. As a charitable organization, Queens Village was required to make an annual filing with the New York State Department of Law (Office of the Attorney General) on NYS Form CHAR 500. The annual filing included audited financial statements and a copy of IRS Form 990, the Return of an Organization Exempt from Income Tax, filed by Queens Village with the Internal Revenue Service (IRS).

ANSWER: Principal states that the allegations in Paragraph 55 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 55 and, on that basis, denies them.

56. The Queens Village Annual Filing for its 2008 fiscal year (July 1, 2008-June 30, 2009) included audited financial statements. For that year, Queens Village received the following government contributions and grants:

| | |
|--------------------|----------------|
| a. New York State: | \$6,228,752.00 |
| b. New York City: | \$2,135,398.00 |
| c. Federal gov't: | \$ 630,554.00 |

Queens Village had total revenues for that year of \$9,462,005.00. \$ 9,174,704.00 came from these government funding sources.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 56 and, on that basis, denies them.

57. In note 5 to its financial statements for the 2008 fiscal year, Queens Village stated that its funding policy for the pension plan was to make contributions as they accrue.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 57 and, on that basis, denies them.

58. In Note 10 to its financial statements for its 2008 fiscal year, Queens Village also

stated that it is associated, through common management, with New Spirit II, Inc. (New Spirit), another 501(c)(3) tax exempt organization, through a management agreement.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 58 and, on that basis, denies them.

59. On information and belief, Diane Gonzalez has served as chief executive officer of New Spirit while serving as chief executive officer of Queens Village; Nancy Brinn has served as chief operating officer of New Spirit while serving as chief operating officer of Queens Village, and Nilda Ruiz has served as chief financial officer of New Spirit while serving as chief financial officer of Queens Village.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 59 and, on that basis, denies them.

60. On information and belief, the application filed by Queens Village each year to New York State's Office of Alcohol and Substance Abuse Services (OASAS) included an estimate of the contribution to the pension plan that Queens Village would have to make that year to fund the pension benefits of plan participants. On information and belief, the New York State OASAS grant allocated money to be used to fund that Queens Village pension plan contribution for its employees.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 60 and, on that basis, denies them.

61. As set forth in that 2008 annual filing, New Spirit II provides outpatient alcoholism and youth counseling and vocational services. Note 10 also provides that New Spirit II "has experienced recurrent operating losses over 11 of the last 12 years." On information and belief, New Spirit obtained funding over the years through grants that were separate from the grants that were obtained by Queens Village.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the

truth of the allegations set forth in Paragraph 61 and, on that basis, denies them.

62. Note 10 also provides that Queens Village had a debt due from New Spirit II in the amount of \$447,638, and that this balance had been written down by a cumulative total of \$258,436.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 62 and, on that basis, denies them.

63. Note 7 to the 2010 fiscal year filing with New York State provides that the cumulative balance of the New Spirit II debt to Queens Village of \$562,810 was written off entirely by Queens Village.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 63 and, on that basis, denies them.

64. Note 7 to the 2015 fiscal year financial statements indicated that in 2016, Queens Village forgave \$746,145 of the total debt of \$ 776,007 owed it by New Spirit, II.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 64 and, on that basis, denies them.

65. The Queens Village Form CHAR500, for the 2014 fiscal year (July 1, 2014- June 30, 2015), signed on May 11, 2016 by Diane Gonzalez and Nilda Ruiz, and then filed with the New York State Office of the Attorney General, includes the Queens Village Form 990 (Income Tax Return). That Form 990 states that Queens Village Program Service Revenue was \$2,668,931. On information and belief, this revenue was unrestricted.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 65 and, on that basis, denies them.

66. That Form 990 states that at the beginning of its fiscal year, Queens Village's net assets were \$3,279,717. By the end of that fiscal year, the net assets had increased to \$4,128,145. The financial report stated that the value of its unrestricted net assets were \$3,279,717 as of June

30, 2014, and \$4,128,145 as of June 30, 2015.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 66 and, on that basis, denies them.

67. Queens Village's revenue, less expenses, for the year, was stated to be \$848,128.

The book value of its buildings were reported, after accumulated depreciation of \$3,473,715, to be \$4,659, 861. The cost basis of the buildings was reported to be \$8,133,576.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 67 and, on that basis, denies them.

68. The Queens Village Form CHAR500, for the 2015 fiscal year (July 1, 2015-June 30, 2016), signed on May 11,2017 by Diane Gonzalez and Nilda Ruiz, and then filed with the New York State Office of the Attorney General, includes the Queens Village Form 990 (Income Tax Return). In its 990 form, Queens Village listed Program Services Revenue of \$2,823,273.

On information and belief, this revenue was unrestricted.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 68 and, on that basis, denies them.

69. That Form 990 states that at the beginning of its fiscal year, the company net assets were \$ 4,128,145. By the end of that fiscal year, the company net assets had increased to \$4,629,818. The financial report stated that the value of the company's unrestricted net assets were \$ 4,128,145 as of July 1, 2015, and \$ 4,629,818 as of June 30, 2016.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 69 and, on that basis, denies them.

70. The company revenue, less expenses, for the year, was stated to be \$501,673. The book value of the company buildings were reported, after accumulated depreciation of \$3,677,054, to be \$4,456,522. The cost basis of the buildings was reported to be \$8,133,576.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 70 and, on that basis, denies them.

71. On information and belief, the OASAS grants to Queens Village for its 2008 through 2010 fiscal years did not authorize Queens Village to take money provided by OASAS for the purpose of funding the contributions Queens Village was required to make to its pension plan and use it, instead, to pay current expenses of New Spirit or for any other corporate purpose. On information and belief, the funds provided by OASAS to Queens Village for the purpose of funding the pension plan were restricted funds that could be used only for the specific purpose of funding the pension plan.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 71 and, on that basis, denies them.

72. On information and belief, for each fiscal year for which it received a grant from OASAS, Queens Village provides a report to OASAS of how it spent the funds provided by OASAS for that fiscal year. On information and belief, Queens Village has never stated to OASAS that it did not contribute into the pension plan all or some of the money that OASAS gave it for those 2008-2010 fiscal years and for future fiscal years through its 2016 fiscal year, to fund its contributions into the pension plan for those years.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 72 and, on that basis, denies them.

73. On information and belief, the money provided by OASAS to Queens Village for the purpose of funding the contributions that Queens Village was required to make to the pension plan for the 2008-2016 pension plan years was used by Queens Village for the purpose of paying expenses incurred by New Spirit or for other Queens Village corporate purposes.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 73 and, on that basis, denies them.

74. The Queens Village Form 990 filing included in its NYS CHAR 900 filing for its

2015 fiscal year stated that as of the end of its 2015 fiscal year, Queens Village had net assets of \$4,629,818.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 74 and, on that basis, denies them.

75. Defendants Diane Gonzalez and Nancy Brinn have consistently failed to enforce the pension plan's right to payment from Queens Village of its debt to the pension plan for the purpose of covering up that the money provided Queens Village in grants to fund the mandatory Queens Village contributions to the pension plan was used to pay expenses incurred by New Spirit or for other Queens Village corporate purposes.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 75 and, on that basis, denies them.

76. A required payment into the pension plan of approximately \$200,000 for each of the 2008-2010 fiscal years would have been a material expense of Queens Village. Any contributions that were required to have been made to the pension plan for a plan year but were not made would then become contributions that were required to be made in the next pension plan year. Any financial audit of the pension plan for any plan year from 2008-2016 would have had to include all due but unpaid contributions from all prior plan years as assets of the plan.

ANSWER: Principal states that the allegations in Paragraph 76 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 76 and, on that basis, denies them.

77. Queens Village has had the same firm auditing its books since its 2010 fiscal year (July 1, 2010-June 30, 2011). The notes to the Queens Village financial reports state each year what the pension plan expense was for the year. Yet since this firm started auditing the Queens Village financial statements, the auditor did not note in its auditor's report that Queens Village had failed to make required contributions in any of the 2008-2016 fiscal years. On information

and belief, Queens Village failed to tell its independent auditor of these due but unpaid contributions to the pension plan.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 77 and, on that basis, denies them.

78. The annual pension plan report (Form 5500 SF) that pension plan administrator Queens Village submitted each year was a material document that the auditor should have reviewed. Through the present, the earnings lost by plan participants on unpaid contributions for the 2008-2016 pension plan years, on information and belief, were likely substantial, given the rise in the stock market during this period and the likelihood that plan participants had invested at least some of their account balances in the stock market.

ANSWER: Principal states that the allegations in Paragraph 78 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 78 and, on that basis, denies them.

79. Instead, over the entire period and through the present, the auditor gave Queens Village an unqualified report that its financial documents fairly stated the financial position of the entity, without clarifying that the company owed the pension plan these unpaid contributions and lost earnings.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 79 and, on that basis, denies them.

**Queens Village Has Paid Off the Mortgage on the Building
Housing its In-Patient Treatment Program**

80. In its NYS CHAR 900 filing for its 2015 fiscal year, ending on June 30, 2016, Note 10 indicated that the secured mortgage taken out by Queens Village in 1998 was due to be fully paid off by 2016, and that its debt service payments had been funded through its OASAS

grants over the years. Note 2 to its financial statements stated that Queens Village had fully settled the mortgage payable.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 80 and, on that basis, denies them.

81. On information and belief, Queens Village could have taken out another mortgage on this property, to obtain the funds necessary to make the pension plan and all participants whole for lost contributions and earnings. On information and belief, Queens Village could have done so in the years leading up to the full payoff of the mortgage. OASAS had been paying the debt service on the mortgage through its grants from when the mortgage was first taken out.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 81 and, on that basis, denies them.

82. On information and belief, Gonzalez and Queens Village did not ask OASAS to fund the additional payments that would have been due under another mortgage because doing so would have required Gonzalez to reveal to OASAS that the money provided by OASAS to fund the Queens Village contributions to the pension plan for the 2008-2010 plan years had not been put into the pension plan, but had been used for other purposes.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 82 and, on that basis, denies them.

83. The Office of the City Register of the City of New York recorded a Satisfaction of Mortgage document, stating that as of February 29, 2016, Queens Village had satisfied its mortgage on the entire lot and building at 116-30 Sutphin Boulevard, Queens, New York. Shortly thereafter, on information and belief, Principal, a very large and sophisticated financial services company, knew or should have known that the mortgage on the building at 116-30 Sutphin Boulevard was fully satisfied. Queens Village continues to own the building at 116-30 Sutphin Boulevard, unencumbered by any mortgage.

ANSWER: Principal states that the allegations in Paragraph 83 represent legal conclusions as to which no response is required; if a response is required, Principal denies that it knew or should have known that the mortgage on the building at 116-30 Sutphin Boulevard was fully satisfied, and states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 83 and, on that basis, denies them.

In 2016, Queens Village Obtains A Large Amount of Money from Verizon Corp. and Puts the Money Into a Television Show on Telemundo Instead of Into the Pension Plan

84. On information and belief, Verizon Corp. paid Queens Village a large amount of money in 2016 so that it could put an antenna on the roof of the Queens Village building. In 2016, the Office of the City Register of the City of New York recorded a document showing that Queens Village had granted an easement with respect to air rights at its building located at 116-30 Sutphin Boulevard and had been paid \$392,000. On information and belief, instead of putting the money into the pension plan to fund the unpaid contributions, Gonzalez and Queens Village used that money to fund a television show on Telemundo, entitled Salvando Vidas Con J-Cap.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 84 and, on that basis, denies them.

Principal, The J-Cap Pension Plan Trustee

85. The 2011 SPD states that pension plan contributions are held under a trust fund and an annuity contract and that the trustee of the Plan is Principal.

ANSWER: Principal admits that it served as a directed trustee for the limited purposes set forth in the applicable directed trust agreements, which speak for themselves, but otherwise states that it lacks knowledge or information sufficient to admit the truth of the remaining allegations set forth in Paragraph 85 and, on that basis, denies them.

86. Upon receiving information from Queens Village necessary to make the appropriate allocations, Principal is responsible for allocating the employer contribution into the individual accounts of the participants and the investment vehicles chosen by the participants.

ANSWER: Principal states that the allegations in Paragraph 86 represent legal conclusions as to which no response is required; if a response is required, Principal

admits that it served as a directed trustee for the limited purposes set forth in the applicable directed trust agreements, which speak for themselves, but otherwise states that it lacks knowledge or information sufficient to admit the truth of the remaining allegations set forth in Paragraph 86 and, on that basis, denies them.

87. Principal knew that Queens Village had failed to make all or most of its required contributions into the plan for the 2008-2010 plan years for the benefit of plan participants, and had failed to make the full amount of required contributions in other plan years from the 2011 plan year through the 2016 plan year. Principal held at least one meeting at Queens Village with Gonzalez, Brinn, Ruiz, and a couple of other high-level employees of Queens Village about the lack of employer contributions for the 2008-2010 plan years. Gonzalez wanted the meeting to be confidential. Principal told Gonzalez, Brinn, Ruiz and the others at the meeting that Queens Village had made none, or almost none, of its required contributions into the pension plan for the 2008-2010 plan years, and that Queens Village had to make the contributions and pay back interest. On information and belief, the meeting occurred during the 2011-2012 pension plan year, after the due date for making contributions for the 2010 plan year ended on June 30, 2011, and at some point before the time passed for amending the pension plan and making it retroactive to the first day of the 2011 plan year, July 1, 2011, which would have been on or about September 15, 2012.

ANSWER: Principal states that the allegations in Paragraph 87 represent legal conclusions as to which no response is required; if a response is required, Principal admits that Queens Village did not make contributions to the pension plan during certain years and that Principal, at some point, became aware that Queens Village had not done so, but otherwise denies the remaining allegations in Paragraph 87.

88. On information and belief, Gonzalez refused to acknowledge responsibility for the failure of Queens Village to make the contributions, or that Queens Village had any obligation to have made those contributions, or that she or Queens Village had any obligation to enforce the plan's right to receive the contributions. Gonzalez there denied any responsibility for

having Queens Village make those contributions.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 88 and, on that basis, denies them.

89. On information and belief, Queens Village has not provided Principal with any written factual explanation why, through the present, those contributions and lost earnings were not made, or could not have been made. On information and belief, Principal has not sent any writing to the Queens Village Board of Directors, informing them of Queens Village's failure to make the required contributions.

ANSWER: Principal admits that it has not sent any writing to the Queens Village Board of Directors informing them of Queens Village's failure to make contributions, but otherwise states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 89 and, on that basis, denies them.

90. On information and belief, when Queens Village did not make all of its required contributions for subsequent years from the 2011 plan year through the 2016 plan year, Principal made no effort to inform Queens Village or the U.S. Department of Labor, that Queens Village was continuing to fail to contribute the amounts that the pension plan required it to contribute, and the earnings on the unpaid contributions lost by the failure. Principal did not file a civil action against Queens Village to recover the unpaid contributions and lost earnings for the plan.

ANSWER: Principal states that the allegations in Paragraph 90 represent legal conclusions as to which no response is required; if a response is required, Principal admits that it did not bring a civil action against Queens Village, but otherwise denies the allegations set forth in Paragraph 90.

91. On information and belief, Principal did not file the civil action against Queens Village because it did not want to lose its business as trustee of the J-CAP pension plan, and because filing such a civil action would be very bad for its business once word got around that it had sued a plan sponsor with whom it had a contract to serve as a plan trustee, for the sponsor's unpaid contributions to its pension plan.

ANSWER: Principal admits that it did not bring a civil action against Queens Village, but otherwise denies the allegations set forth in Paragraph 91.

2017-2018 Communications with Queens Village

92. By letters dated December 8, 2017, to the Administrator of the J-Cap Pension Plan, on behalf of plaintiff Ronald Sumter and on behalf of class member Muriel Harris, attorney Christopher Dagg, Brooklyn Legal Services, asked the Administrator for, among other information;

- a. Annual account statements for all years that Mr. Sumter and Ms. Harris worked in covered employment; and
- b. For all relevant years in which no contributions were made to Mr. Sumter's account, [to] specify those years and provide a statement explaining the reasons no contributions were made.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 92 and, on that basis, denies them.

93. By e-mail dated February 8, 2018, Maryann K. Geary, Executive Vice President of BPAS Plan Administration and Recordkeeping Services responded, with a copy to Nilda Ruiz. Geary wrote that required contributions for the plan years 2008, 2009 and 2010 were not made on account of a "business hardship." She did not further describe this "business hardship" and did not explain whether this hardship continued through the present.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 93, and, on that basis, denies them.

94. She also wrote that the pension plan was going to go through the IRS Voluntary Correction Program to request a waiver for all or part of the contributions due for 2008, 2009, and 2010.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the

truth of the allegations set forth in Paragraph 94, and, on that basis, denies them.

95. On Wednesday March 8, 2018, Attorney Dagg sent an e-mail to Geary, requesting an update. Ms. Geary responded by e-mail dated March 16th: “We are still working on the corrections for the plan. I will keep you posted as soon as we have a time frame.”

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 95, and, on that basis, denies them.

The Express Terms of the IRA Program Do Not Authorize Any Such “Waiver”

96. Section 6.02 (1) of the IRS Voluntary Correction Program requires a plan to be restored “to the position to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.” IRS Revenue Procedure 2016-51, 2016 IRS Lexis 586.

ANSWER: Principal states that the allegations in Paragraph 96 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the IRS promulgated the Revenue Procedure 2016-51, which speaks for itself, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 96 and, on that basis, denies them.

97. There is no such thing as “voluntary compliance” that puts a governmental seal of approval on cheating employees out of what they were promised in exchange for their labor, under any doctrine of “waiver” !

ANSWER: Principal states that the allegations in Paragraph 97 represent legal conclusions as to which no response is required; if a response is required, Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 97 and, on that basis, denies them.

98. Further, where the plan sponsor is self-correcting a significant operational failure, section 9 of the Revenue Procedure provides that the last day of the correction period “is the last day of the second plan year following the plan year for which the failure occurred.”

ANSWER: Principal states that the allegations in Paragraph 98 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the IRS promulgated the Revenue Procedure 2016-51, which speaks for itself, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 98 and, on that basis, denies them.

99. For the 2010 plan year which ended on June 30, 2011, that would have been June 30, 2014. Thus, the plan sponsor is way out of time for any so-called “voluntary correction.”

ANSWER: Principal states that the allegations in Paragraph 99 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 99 and, on that basis, denies them.

100. The Geary response was a willful attempt to stall the participants.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 100 and, on that basis, denies them.

CLASS ACTION ALLEGATIONS

101. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

ANSWER: Principal states that the statement regarding the instant lawsuit in Paragraph 101 does not represent factual allegations to which a response is required; if a response is required, Principal admits that the named plaintiffs have brought this lawsuit, and states that the First Amended Complaint speaks for itself, but Principal otherwise denies the allegations therein, except as explicitly admitted in this Answer.

102. Plaintiffs asserts their claims on behalf of the following class of participants: All participants in the pension plan during the 2008-2016 pension plan years who were eligible for but did not receive a timely contribution allocated to their accounts in the pension plan for at least one of those plan years, and who were, have become, or still may become vested in their benefits under the plan, and their beneficiaries and estates.

ANSWER: Principal states that the statement regarding the instant lawsuit in Paragraph 102 does not represent factual allegations to which a response is required; if a response is required, Principal admits that the named plaintiffs have brought this lawsuit, and states

that the First Amended Complaint speaks for itself, but Principal otherwise denies the allegations therein, except as explicitly admitted in this Answer.

103. Numerosity: The class is so numerous that joinder of all class members is impractical. As set forth in its Form 5500SF's, the pension plan had 85 participants at the beginning of the 2010 plan year, 76 at the end of the plan year, and 59 who had account balances at the end of the plan year. For its 2009 plan year, the plan had 96 participants at the beginning of the plan year, 80 at the end of the plan year, and 67 who had account balances at the end of the plan year.

ANSWER: Principal states that the allegations in Paragraph 103 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 103 and, on that basis, denies them.

104. For the 2013 plan year, the plan had 99 participants at the beginning of the plan year, 73 at the end of the plan year, and 71 who had account balances at the end of the plan year. For the 2016 plan year, the plan had 67 active participants at the beginning of the plan year, and 60 at the end of the plan year.

ANSWER: Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves.

105. The members of the class can be objectively ascertained through the use of information contained in the pension plan's records because both Queens Village and Principal, which allocates the contribution to the accounts of individual participants, should know which participants were plan members entitled to receive a contribution for any or all of the plan years from the 2008 plan year through the 2016 plan year.

ANSWER: Principal states that the allegations in Paragraph 105 represent legal conclusions as to which no response is required; if a response is required, Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the

remainder of the allegations set forth in Paragraph 103 and, on that basis, denies them.

106. Typicality: Plaintiff's claims are typical of the class members' claims. All participants were treated the same when Queens Village failed to make its required contributions into the plan for those plan years. Certification is also desirable and proper because Plaintiffs will fairly and adequately protect the interest of the class they seek to represent. There is no conflict of interest between plaintiffs and any other member of the proposed class and the interest of all members of the class is the same.

ANSWER: Principal states that the allegations in Paragraph 106 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 106 and, on that basis, denies them.

107. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class, as their interest is aligned with the Class that they seek to represent. They have retained counsel experienced in ERISA pension litigation. Plaintiff's attorneys Robert L. Liebross and Edgar Pauk are qualified, experienced and able to conduct the proposed class action litigation.

ANSWER: Principal states that the allegations in Paragraph 107 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 107 and, on that basis, denies them.

108. Commonality: Common questions of law and fact exist as to all class members and predominate over any questions solely affecting individual class members, including but limited to:

- a. the obligation of the pension plan administrator to enforce the plan's chose in action (the plan asset) against plan sponsor Queens Village for the unpaid contributions and lost earnings;
- b. the obligation of the pension plan administrator, and of Diane Gonzalez, both fiduciaries with a conflict of interest, to petition this federal court and seek guidance as to their obligation to enforce the plan chose in action against the plan sponsor, Queens Village;

- c. the legal significance of the concealment by plan administrator Queens Village acting through Nancy Brinn and Nilda Ruiz, on the 5500 form for the 2009 plan year through the present, of the failure of plan sponsor Queens Village to make the required contributions for the 2008-2010 plan years; and
- d. the obligation of co-fiduciary Principal to have filed a civil action against Queens Village to recover the unpaid contributions and lost earnings.

ANSWER: Principal states that the allegations in Paragraph 108 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 108 and, on that basis, denies them.

109. Class certification also is appropriate under Fed. R. Civ. P. 23(b)(1)(B) because adjudications of these legal issues with respect to individual class members, as a practical matter, would be dispositive of the interests of other plan participants or would substantially impair or impede their ability to protect their interests.

ANSWER: Principal states that the allegations in Paragraph 109 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 109 and, on that basis, denies them.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), for which Relief is Authorized by ERISA section 409, 29 U.S.C. § 1109.

(Against fiduciaries Queens Village, Diane Gonzalez Nancy Brinn, and Nilda Ruiz)

110. Paragraphs 1-109 are incorporated by reference as if fully set forth herein.

ANSWER: Principal states that Paragraph 110 does not represent any additional factual allegations to which a response is required; if a response is required, Principal incorporates by reference its answers to Paragraphs 1-109 as if fully set forth herein.

111. ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), provides: A civil action may be brought by a . . . participant for appropriate relief under section 409.

ANSWER: Principal states that the allegations in Paragraph 111 represent legal conclusions as to which no response is required; if a response is required, Principal admits that 29 U.S.C. § 1132(a)(2) sets forth certain causes of action, which speak for themselves.

112. ERISA section 409, 29 U.S.C. § 1109, provides, in pertinent part:

- (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any or profits of such fiduciary which have been made through assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for violation of section 411 of this Act.

ANSWER: Principal states that the allegations in Paragraph 112 represent legal conclusions as to which no response is required; if a response is required, Principal admits that 29 U.S.C. § 1109 sets forth certain fiduciary liability, which speaks for itself.

113. When an employer fails to make contractually required contributions to a pension plan, the plan has an enforceable right to collect the unpaid contributions, and that enforceable right is a plan asset. Rahm v. Halpin, 566 F.3d 286, 291 (2d Cir. 2009), citing United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997).

ANSWER: Principal states that the allegations in Paragraph 113 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the Second Circuit issued the decisions cited in Paragraph 113, which decisions speak for themselves.

114. Plan Administrator and named fiduciary Queens Village has continuously failed to enforce the pension plan's right to collect the unpaid contributions Queens Village, in its capacity as plan sponsor and employer, owed the pension plan, which Principal then would allocate into the individual accounts of all plan participants eligible to share in the allocation, in violation of ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), and its duties under ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1).

ANSWER: Principal states that the allegations in Paragraph 114 represent legal

conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 114 and, on that basis, denies them.

115. Plan fiduciary Diane Gonzalez is and has been responsible for determining which of Queens Village's creditors would be paid or in what order, and had authority and control over the management of Queens Village. She has continuously failed to cause Queens Village, as named fiduciary, to enforce the plan's right to collect the unpaid contributions that Queens Village in its capacity as plan sponsor and employer owed the pension plan, in violation of her fiduciary duties of loyalty and prudence, in violation of ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1).

ANSWER: Principal states that the allegations in Paragraph 115 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 115 and, on that basis, denies them.

116. Plan fiduciaries Queens Village, Nancy Brinn and Nilda Ruiz concealed the failure of Queens Village to make mandatory employer contributions into the pension plan by failing to list the unpaid contributions for plan years 2008-2016 as required contributions on Form 5500SF, the pension plan's annual report to the Department of Labor, for each plan year subsequent to the plan year for which a required contribution was not made, in violation of their duties of prudence and loyalty, in violation of ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1). Queens Village, Brinn and Ruiz did this for the purpose of concealing that money given in grants to Queens Village for the purpose of paying these contributions into the pension plan was used for other purposes. They also concealed that failure for the purpose of hiding their own roles and the role of Queens Village chief executive officer and plan fiduciary Diane Gonzalez in failing to cause plan sponsor and employer Queens Village to make its required contributions into the pension plan.

ANSWER: Principal states that the allegations in Paragraph 116 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 116 and, on that basis, denies them.

SECOND CLAIM FOR RELIEF

ERISA section 404(a), 29 U.S.C. § 1104(a), as enforced through ERISA section 502(a)(3), 29 U.S.C. §1132(a)(3)

(Against fiduciaries Queens Village, Diane Gonzalez Nancy Brinn, and Nilda Ruiz)

117. Paragraphs 1-116 are incorporated by reference as if fully set forth herein.

ANSWER: Principal states that Paragraph 117 does not represent any additional factual allegations to which a response is required; if a response is required, Principal incorporates by reference its answers to Paragraphs 1-116 as if fully set forth herein.

118. ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), requires a plan fiduciary to discharge its duties with respect to a plan solely in the interest of plan participants and (A) for the exclusive purpose of providing benefits to participants; (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with Title I of ERISA.

ANSWER: Principal states that the allegations in Paragraph 118 represent legal conclusions as to which no response is required; if a response is required, Principal admits that 29 U.S.C. § 1104 sets forth fiduciary duties, which speak for themselves.

119. When an employer fails to make contractually required contributions to a pension plan, the plan has an enforceable right to collect the unpaid contributions and that enforceable

right is a plan asset. Rahm v. Halpin, 566 F.3d 286, 291 (2d Cir. 2009), citing United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997).

ANSWER: Principal states that the allegations in Paragraph 119 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the Second Circuit issued the decisions cited in Paragraph 119, which decisions speak for themselves.

120. Plan Administrator and named fiduciary Queens Village has continuously failed to enforce the pension plan's right to collect the unpaid contributions that plan sponsor Queens Village owed the pension plan, which Principal then would allocate into the individual accounts of all plan participants eligible to share in the allocation, in violation of ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), and its duties under ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1).

ANSWER: Principal states that the allegations in Paragraph 120 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 120 and, on that basis, denies them.

121. Plan fiduciary Diane Gonzalez is and had been responsible for determining which of Queens Village's creditors would be paid or in what order, and had authority and control over the management of Queens Village. She has continuously failed to cause Queens Village, as named fiduciary, to enforce its right to collect the unpaid contributions that Queens Village in its capacity as plan sponsor owed the pension plan. She did so, at least in part, for the purpose of covering up her use of the money given in grants to Queens Village for the purpose of paying these contributions, for other purposes, in violation of her fiduciary duties of loyalty and prudence, in violation of ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1).

ANSWER: Principal states that the allegations in Paragraph 121 represent legal conclusions as to which no response is required; if a response is required, Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 121 and, on that basis, denies them.

122. Plan fiduciaries Nancy Brinn and Nilda Ruiz further concealed the failure of

Queens Village to make mandatory employer contributions into the pension plan by failing to list the unpaid contributions for plan years 2008-2016 as required contributions on Form 5500 SF, the pension plan's annual report to the Department of Labor, for each plan year subsequent to the plan year for which a required contribution was not made, in violation of their duties of prudence and loyalty, in violation of ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1). Brinn and Ruiz did this for the purpose of concealing that money given in grants to Queens Village for the purpose of paying these contributions into the pension plan was used for other purposes. They also concealed that failure for the purpose of hiding their own roles and the role of Queens Village chief executive officer Diane Gonzalez in failing to cause employer Queens Village to make its required contributions into the pension plan.

ANSWER: Principal states that the allegations in Paragraph 122 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the pension plan submitted Forms 5500 to the U.S. Department of Labor, which documents speak for themselves, but Principal states that it otherwise lacks knowledge or information sufficient to admit the truth of the remainder of the allegations set forth in Paragraph 122 and, on that basis, denies them.

THIRD CLAIM FOR RELIEF

(Against Principal for Co-Fiduciary Liability, under ERISA section 405(a), 29 U.S.C. 1105(a), as enforced through ERISA section 502(a)(3), 29 U.S.C. §1132(a)(3))

123. Paragraphs 1-122 are incorporated by reference as if fully set forth herein.

ANSWER: Principal states that Paragraph 123 does not represent any additional factual allegations to which a response is required; if a response is required, Principal incorporates by reference its answers to Paragraphs 1-122 as if fully set forth herein.

124. ERISA section 405(a), 29 U.S.C. §1105(a), provides:

LIABILITY FOR BREACH BY CO-FIDUCIARY.

(a) **Circumstances Giving to Liability.** In addition to any liability which he may have under any other provision of this part [29 USCS §§ 1101 et seq.], a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USCS § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ANSWER: Principal states that the allegations in Paragraph 124 represent legal conclusions as to which no response is required; if a response is required, Principal admits that 29 U.S.C. § 1105 sets forth circumstances giving rise to co-fiduciary liability, which speak for themselves.

125. Principal, a co-fiduciary of named fiduciary Queens Village, knew that Queens Village was engaged in an ongoing breach of fiduciary duty in refusing to enforce the plan's right to payment of the debt that Queens Village in its capacity as employer and plan sponsor owed the pension plan for its unpaid contributions. On information and belief, after this Court's decision in Rahm v. Halpin, 566 F.3d 286, 291 (2d Cir. 2009), Principal, a sophisticated ERISA pension plan trustee, knew that Queens Village's ongoing failure to enforce the plan's right to payment of the debt owed the plan by Queens Village in its capacity as employer and plan sponsor, was a breach of fiduciary duty.

ANSWER: Principal states that the allegations in Paragraph 125 represent legal conclusions as to which no response is required; if a response is required, Principal admits that the Second Circuit issued a decision in *Rahm v. Halpin*, which decision speaks for itself, and that it served as a directed trustee for the limited purposes set forth in the applicable directed trust agreements, but otherwise denies the remainder of the allegations set forth in Paragraph 125.

126. In early 2016, Queens Village had satisfied the mortgage on its very valuable asset, its building and property located at 116-30 Sutphin Boulevard, Jamaica, NY, 11434-1527, worth millions of dollars.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the

truth of the allegations set forth in Paragraph 126 and, on that basis, denies them.

127. Upon satisfying the mortgage, Queens Village had a very valuable asset whose value exceeded the amount that Queens Village then owed the pension plan for unpaid contributions and lost earnings. Queens Village also then had unrestricted revenue each year in amounts of over two million dollars.

ANSWER: Principal states that it lacks knowledge or information sufficient to admit the truth of the allegations set forth in Paragraph 127 and, on that basis, denies them.

128. Principal breached its duties as a co-fiduciary of the pension plan in 2016 in failing to file a civil action against Queens Village for failing to enforce the plan's right to recover the debt owed by plan sponsor Queens Village.

ANSWER: Principal states that the allegations in Paragraph 128 represent legal conclusions as to which no response is required; if a response is required, Principal denies the allegations set forth in Paragraph 128.

129. Pursuant to ERISA section 410, 29 U.S.C. 1110, any provision in any agreement that Principal has with Queens Village, or any provision in any instrument, which purports to relieve Principal from responsibility or liability for any responsibility, obligation, or duty under ERISA section 405, 29 U.S.C. §1105, or under any other provision of Part Four of Title I of ERISA, 29 U.S.C. §§ 1101 et seq., with respect to the J-CAP pension plan, is void as against public policy.

ANSWER: Principal states that the allegations in Paragraph 129 represent legal conclusions as to which no response is required; if a response is required, Principal admits that 29 U.S.C. § 1110 provides that certain provisions are void as against public policy, which speaks for itself, but otherwise denies the remainder of the allegations in Paragraph 129.

PRAYER FOR RELIEF

ANSWER: In response to Plaintiffs' Prayer for Relief and each subpart thereof, Principal denies that Plaintiff is entitled to any of the relief requested or to any relief whatsoever, and denies the allegations therein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiffs fail to state a claim or cause of action upon which relief can be granted.

Second Affirmative Defense

Plaintiffs' claimed relief does not constitute appropriate equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Third Affirmative Defense

Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations or repose.

Fourth Affirmative Defense

Plaintiffs' claims are barred in whole or in part by the doctrines of laches or estoppel.

Fifth Affirmative Defense

To the extent Plaintiffs have stated a claim on which relief can be granted, Plaintiffs have proximately caused, contributed to, or failed to mitigate any and all losses claimed.

Sixth Affirmative Defense

This action may not be maintained as a class action because Plaintiffs cannot satisfy the requirements of Federal Rule of Civil Procedure 23.

Seventh Affirmative Defense

This Court does not have subject matter jurisdiction, and cannot provide any relief to Plaintiffs, because Plaintiffs lack standing under Article III of the United States Constitution.

Reservation of Rights

Principal reserves the right to assert any additional affirmative defenses that may be discovered or disclosed during the course of additional discovery and investigation.

CROSS-CLAIMS

Pursuant to Federal Rule of Civil Procedure 13(g), Principal hereby asserts, in the alternative, cross-claims for indemnity or contribution against Defendants Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc., Diane Gonzalez, Nancy Brinn, and Nilda Ruiz (individually and collectively, the “Queens Village Defendants”), in the event that Principal is held liable as a co-fiduciary for any or all of the Queens Village Defendants’ alleged breaches.

1. The only cause of action brought against Principal in this case is for co-fiduciary liability in connection with alleged underlying breaches of fiduciary duty by the Queens Village Defendants.

2. Principal cannot be held liable as a co-fiduciary unless some or all of the Queens Village Defendants committed a breach of fiduciary duty.

3. In the event that Principal is held liable as a co-fiduciary, it will necessarily be as a result of a breach of fiduciary duty by the Queens Village Defendants, for which some or all of the Queens Village Defendants are primarily, if not exclusively, responsible.

4. The Second Circuit has held “that incorporating traditional trust law’s doctrine of contribution and indemnity into the law of ERISA is appropriate.” *Chemung Canal Tr. Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 18 (2d Cir. 1991).

5. Accordingly, in the event that Principal is held liable as a co-fiduciary, Principal is entitled to indemnification or contribution from the Queens Village Defendants in the amount of any judgment against Principal, including but not limited to any award of damages, fees, costs, or other relief.

Dated: October 1, 2019

Respectfully submitted,

/s/ Lars C. Golumbic

Lars C. Golumbic (admitted *pro hac vice*)
Samuel I. Levin (admitted *pro hac vice*)

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