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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JENNIFER WRIGHT, *et. al.*, Plaintiffs, vs. GREGORY J. STANTON, in his official capacity as Mayor of the City of Phoenix; *et. al.*, Defendants.	Case No. CV2013-010915 **PLAINTIFFS' RESPONSE TO DEFENDANT PHOENIX POLICE SERGEANTS AND LIEUTENANTS ASSOCIATION'S MOTION TO DISMISS** *Hon. John Rea* **(Oral Argument Requested)**

Plaintiffs Jennifer Wright, Eric Wnuck, and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), hereby respond to Defendant Phoenix Police Sergeants and Lieutenants Association's ("PPSLA") Motion to Dismiss. The Memorandum of Agreement ("MOA") between the City of Phoenix ("City") and PPSLA permits unlawful pension payments to Phoenix Police Department Sergeants and Lieutenants that Taxpayers directly fund. Defendant's Motion to Dismiss is incorrect in its factual assertions and conclusions of law.

For the reasons set forth below, Taxpayers respectfully request that Defendant's Motion to Dismiss be DENIED. This Response is supported by the following Memorandum of Points and Authorities and pleadings and matters of record filed with the Court, all of which are incorporated by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement

On August 15, 2013, Taxpayers filed a Complaint to end a practice perpetrated by the

City and PPSLA that allows Phoenix Police Department Sergeants and Lieutenants to artificially inflate their pension payments in clear violation of state law. Defendants now seek to dismiss Taxpayers' Complaint for lack of taxpayer standing and for failure to state a justiciable controversy. (Def.'s Mot. 6-7). On October 8, 2013, Taxpayers filed an Amended Complaint, adding the City of Phoenix Police Pension Board and the Public Safety Personnel Retirement System ("PSPRS") as additional defendants. (FAC).

Defendant PPSLA is a public labor union that represents Phoenix Police Department members in the ranks of Sergeant and Lieutenant. (FAC ¶ 18). PPSLA is the exclusive "meet and discuss" representative of Phoenix Police Department Sergeants and Lieutenants. (FAC ¶ 33); PHOENIX, ARIZ., CODE § 2-226. PPSLA is obligated by law to enter into discussions with the City regarding*, inter alia,* payment of salary and wages and to reduce that agreement to writing in the form of a memorandum of agreement. *See* PHOENIX, ARIZ., CODE § 2-209. On April 24, 2012, PPSLA entered into an MOA with the City that included provisions permitting Phoenix Police Department Sergeants and Lieutenants to increase their "final average salary" and thereby inflate their pension payments. (FAC ¶¶ 46-47); (MOA). Those provisions have created an unlawful legal liability for Taxpayers and resulted in the direct expenditure of Taxpayer funds.

The Defendant's Motion to Dismiss misunderstands the manner in which pension payments for Phoenix Police Department Sergeants and Lieutenants are approved and funded.[1] PPSLA asserts that Taxpayers lack standing because "[t]he City of Phoenix does not pay pension payments to PPSLA members" (Def.'s Mot. 5) and there is "no expenditure of municipal funds" (Def.'s Mot. 6) as a result of provisions in the MOA that allow Phoenix Police Department Sergeants and Lieutenants to increase their salaries by cashing in unused vacation leave, sick leave, compensatory time, and other fringe benefits. MOA, §§ 3-1D, 3-2(D)(1), 3-

[1] A declaration of PSPRS Administrator, James Hacking, describing the manner in which pension payments are determined and financed for Phoenix Police Department Sergeants and Lieutenants is attached as **Exhibit A** and incorporated by reference. (Hacking Decl.)

4(B)(5), 5-5(L), 5-5(M)(1). In a related claim, Defendant appears to argue that Taxpayers have not stated a justiciable controversy that is ripe for adjudication because Taxpayers do not have "concrete interests at stake" or rights that are being affected by unlawful provisions in the MOA. (Def.'s Mot. 7).

Put simply, pension payments to Phoenix Police Department Sergeants and Lieutenants do not grow on trees. They exist because the taxes of Taxpayers directly fund them. Every time a retired Phoenix Police Department Sergeant or Lieutenant receives a pension check, that check has been directly funded by contributions from Phoenix Taxpayers in Phoenix's separate account in PSPRS. (FAC ¶¶ 23-24, 26-30); (Hacking Decl. ¶¶ 7, 10-16); ARIZ. REV. STAT. § 38-843. The MOA between the City and PPSLA creates a legal obligation for Taxpayers to fund pension payments to Phoenix Police Department Sergeants and Lieutenants. *See* PHOENIX, ARIZ., CODE § 2-209. The clear purpose and effect of the provisions of the MOA at issue are to allow Phoenix Police Department Sergeants and Lieutenants to increase their pensionable salary in violation of state law. MOA, §§ 3-1D, 3-2(D)(1), 3-4(B)(5), 5-5(L), 5-5(M)(1); ARIZ. REV. STAT. § 38-842(12). When unlawful pension payments are remitted pursuant to the terms of the MOA there is a direct expenditure of taxpayer funds. Taxpayers' interest is their liability to replenish the City's coffers as a result of unlawful expenditures. They have a right to prosecute unlawful expenditures of municipal funds in this action.

II. Legal Analysis

A. Taxpayers Have Clear Standing Because Taxpayers Directly Finance Unlawful Pension Payments to Members of PPSLA

Taxpayers have standing because they directly fund unlawful pension payments for Phoenix Police Department Sergeants and Lieutenants pursuant to the terms of the MOA between PPSLA and the City. The Arizona Supreme Court has long-recognized that taxpayers may challenge legislative acts that unlawfully expend public money. *Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds."). Arizona courts have regularly conferred broad taxpayer standing when municipal taxpayers challenge legislative acts or contracts that violate state law or the Arizona Constitution. *Secrist v. Diedrich*, 6 Ariz.App 102, 104, 430 P.2d 448, 450 (App. 1967) (school district taxpayers have standing to challenge expenditure of public funds that violated state law); *Turken v. Gordon*, 220 Ariz. 456, 461, 207 P.3d 709, 714 (App. 2008), *rev'd on other grounds*, 223 Ariz. 342, 224 P.3d 158 (2010) (finding standing where Phoenix taxpayers brought action against city to enjoin payments to private developer that violated the Arizona Constitution). "The right to maintain such suits is based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Ethington*, 66 Ariz. at 386, 189 P.2d at 212. Taxpayers will have standing to challenge unlawful government expenditures if taxpayers can show a direct expenditure of funds generated through taxation or an increased levy of tax. *See Dail v. Phoenix*, 128 Ariz. 199, 202, 624 P.2d 877, 880 (App. 1980).

PPSLA challenges Taxpayers' standing because "[t]he City of Phoenix does not pay pension payments to the PPSLA members. . . ." and "[p]laintiffs cannot cite any illegal expenditure of municipal funds." (Def.'s Mot. 5). Additionally, while appearing to concede that provisions of the MOA between PPSLA and the City result in higher pension payments for Phoenix Police Department Sergeants and Lieutenants, PPSLA argues "[t]here is still no expenditure of municipal funds even if these cited Sections in the MOA might result in some PPSLA members receiving the higher pension payments from PSPRS." (Def.'s Mot. 6).

Contrary to PPSLA's claims, Phoenix Taxpayers directly finance pension payments to PPSLA members. Each employer in PSPRS, including the Phoenix Police Department, has a separate account in PSPRS to which contributions are made and from which pension payments are drawn. (FAC ¶¶ 23, 26); (Hacking Decl. ¶¶ 7, 10-16); ARIZ. REV. STAT. § 38-843. Monies from employee and employer contributions are pooled for investment purposes, but benefit payments are not shared by all employers in the system; instead, benefit payments are paid exclusively from each employer's separate account in PSPRS. (FAC ¶ 23); (Hacking Decl. ¶

12). Therefore, when a pension payment is made to Phoenix Police Department Sergeants and Lieutenants, Phoenix Taxpayers are directly funding that payment.

As a result of the MOA between PPSLA and the City, the City is reporting final average salary amounts for Phoenix Police Department Sergeants and Lieutenants that include items of pensionable compensation that are prohibited by state law. (FAC ¶¶ 36-43). Therefore, the MOA is creating an unlawful obligation for Taxpayers. When PSPRS receives that salary information, PSPRS administratively "cuts the check" from the Phoenix Police Department's separate account in PSPRS. (FAC ¶ 44); (Hacking Decl. ¶ 32); ARIZ. REV. STAT. § 38-848. PSPRS is merely a trustee of the Phoenix Police Department's fund. ARIZ. REV. STAT. § 38-848. As a result, when Phoenix Police Sergeants and Lieutenants receive "higher pension payments from PSPRS" (Def.'s Mot. 6), it is ultimately Taxpayers, not PSPRS, who are funding those payments through employer contributions to the Phoenix Police Department's separate account. In other words, when unlawful pension amounts are permitted and approved in PPSLA's MOA with the City, they result in a direct expenditure of funds generated through taxation on Phoenix Taxpayers.

Moreover, contribution rates are different for each employer in PSPRS, including the Phoenix Police Department, and change every fiscal year based on actuarial valuation. (FAC ¶ 27); (Hacking Decl. ¶ 14). If pension payments are increased through unlawful expenditures, the City's contribution rate to PSPRS will also increase. (FAC ¶¶ 27-29); (Hacking Decl. ¶¶ 15-16). Since the City's contributions to PSPRS are generated through taxation on Phoenix residents, Taxpayers are directly harmed when the City's contributions increase as a result of additional, unlawful expenditures. When additional, unlawful liabilities are placed on the Phoenix Police Department's separate account in PSPRS, there is a clear pecuniary loss to Taxpayers who have to make up the liabilities through increased taxpayer contributions. *See Dail*, 128 Ariz. at 202, 624 P.2d at 880.

Defendant relies heavily on *Dail v. City of Phoenix* in arguing that Taxpayers lack standing in this case. 128 Ariz. 199, 624 P.2d 877. In *Dail*, the Arizona Court of Appeals found that a taxpayer did not have standing to challenge a contract between the City of Phoenix and a development company for the purchase of a water system that generated its own revenue and for which there was no pecuniary loss. *Id.* at 202, 880. The facts in *Dail* are clearly distinguishable from the facts in this case. In *Dail*, taxpayer funds were not raised to finance the purchase of the water system at issue; rather, "the expenditures have always been made from revenue generated by the operation of the water system." *Id.* In contrast, as described *supra*, Phoenix Taxpayers directly fund pension payments in the Phoenix Police Department's separate account in PSPRS. (FAC ¶¶ 23-24, 26); (Hacking Decl. ¶¶ 7, 10-13). Additionally, in *Dail*, "the City did not incur a pecuniary loss as a result of the purchase or operation of the water system." *Id.* In contrast, Taxpayers experience a pecuniary loss when additional liabilities are placed on the Phoenix Police Department's separate account in PSPRS – liabilities that must be replenished through additional taxpayer contributions to that account. (FAC ¶¶ 27-30); (Hacking Decl. ¶¶ 14-16). If anything, *Dail* clearly supports standing in this case because there is a direct expenditure of funds generated through taxation and increased contributions to the Phoenix's Police Department's separate account in PSPRS as a result of increased liabilities to that account.

Taxpayers have asserted that PPSLA's MOA with the City results in unlawful pension payments to PPSLA members that Taxpayers directly finance in the Phoenix Police Department's separate account in PSPRS. Because the MOA provisions at issue result in a direct expenditure of Taxpayer funds for an unlawful purpose, Taxpayers have established standing.

B. There is a Justiciable Controversy that is Ripe for Adjudication because Taxpayers are Presently Harmed by Unlawful Pension Payments Made Pursuant to the MOA between PPSLA and the City

There is a justiciable controversy because the MOA, presently in effect between PPSLA and the City, allows current Phoenix Sergeants and Lieutenants to increase their pension payments in violation of state law. The claim is ripe because taxpayers suffer a direct injury when pension payments are remitted to Phoenix Police Department Sergeants and Lieutenants as a result of unlawful provisions in the MOA.

Defendant argues that this case does not present a justiciable controversy because Taxpayers "seek an injunction for hypothetical issues, or, issues that plaintiffs only anticipate might happen in the future." (Def.'s Mot. 7). Relying on *Moore v. Bolin*, a case involving an electoral dispute between a gubernatorial candidate and the Arizona Secretary of State, Defendant appears to contend that Taxpayers' complaint is predicated on some future event rather than an existing state of affairs. (Def.'s Mot. 7); 70 Ariz. 354, 220 P.2d 850 (1950). Additionally, repackaging what is essentially Defendant's same standing argument (Def.'s Mot. 3-6), Defendant argues Taxpayers lack "sufficient, concrete interests at stake" (Def.'s Mot. 7), such that Taxpayers' Complaint is not yet ripe for adjudication.

For a court to grant declaratory relief, a justiciable controversy must exist. *Original Apartment Movers, Inc. v. Waddell,* 179 Ariz. 419, 420, 880 P.2d 639, 640 (App.1993). A justiciable controversy exists if there is "an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party." *Keggi v. Northbrook Prop. & Cas. Ins. Co.,* 199 Ariz. 43, 45, ¶ 10, 13 P.3d 785, 787 (App.2000).

Taxpayers' interest in this case is derived from their status as Phoenix taxpayers. (FAC ¶¶ 3-5). As described *supra*, it is a well-established principle that Taxpayers may seek to enjoin the illegal expenditure of public funds – their right to maintain such suits deriving from their equitable ownership of taxpayer dollars and their liability to pay for unlawful expenditures. *Ethington*, 66 Ariz. at 386, 189 P.2d at 212. Taxpayers have a right to ensure tax dollars are lawfully spent. That right is violated by defendants in this case when unlawful pension payments are remitted pursuant to the MOA between PPSLA and the City. The MOA was entered into on April 24, 2012 and will remain in effect until the first regular pay period in July 2014. (FAC ¶ 46, MOA, § 6-5). Taxpayers, therefore, have a present and existing right to prevent the unlawful expenditure of Taxpayers' funds made in accordance with the MOA. Unless Defendant is contending that Phoenix Police Department Sergeants and Lieutenants will never retire, then Defendant's argument is without merit. Taxpayers are seeking to enjoin an agreement that is currently in place and which presently permits an unlawful expenditure of Taxpayers' funds that Taxpayers are liable to replenish. Taxpayers have stated a justiciable claim.

Additionally, "[r]ipeness is analogous to standing because the 'doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur.' " *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 244, 141 P.3d 416, 419 (App.2006), *quoting Winkle v. City of Tucson,* 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). Therefore, the same facts that establish standing and a justiciable controversy and in this case, *viz.*, that taxpayers are directly and presently harmed because they fund unlawful pension payments pursuant to the MOA between PPSLA and the City, apply equally in finding that Taxpayers' injuries are ripe for adjudication.

III. Conclusion

For the foregoing reasons, Taxpayers respectfully request that Defendant's Motion to Dismiss and request for attorneys' fees be DENIED.

Respectfully submitted on this 10th Day of October, 2013.

/s/ Jonathan Riches
Clint Bolick (021684)
Jonathan Riches (025712)
Taylor Earl (028179)
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 10th day of October, 2013, with a copy delivered via the ECF system to:

The Honorable John Rea
Maricopa County Superior Court

Clerk of Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, AZ 85003

COPY of the foregoing E-MAILED and MAILED this 10th day of October, 2013 to:

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/s/ Jonathan Riches

Exhibit A

Exhibit A

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IN AND FOR THE COUNTY OF MARICOPA

JENNIFER WRIGHT; ERIC WNUCK; and JIM JOCHIM,

Plaintiffs,

vs.

GREGORY J. STANTON, in his official capacity as Mayor of the City of Phoenix; BILL GATES, in his official capacity as member of the Phoenix City Council and Vice Mayor; THELDA WILLIAMS, in her official capacity as member of the Phoenix City Council; JIM WARING, in his official capacity as member of the Phoenix City Council; TOM SIMPLOT, in his official capacity as member of the Phoenix City Council; DANIEL VALENZUELA, in his official capacity as member of the Phoenix City Council; SAL DICICCIO, in his official capacity as member of the Phoenix City Council; MICHAEL NOWAKOWSKI, in his official capacity as member of the Phoenix City Council; MICHAEL JOHNSON, in his official capacity as member of the Phoenix City Council; and DAVID CAVAZOS, in his official capacity as City Manager of the City of Phoenix; CITY OF PHOENIX; and PHOENIX POLICE SERGEANTS AND LIEUTENANTS ASSOCIATION.

Defendants.

Case No. CV2013-010915

DECLARATION OF MR. JAMES HACKING, PSPRS ADMINISTRATOR

Hon. John Rea

Pursuant to Arizona Rules of Civil Procedure 80(i), **Mr. James Hacking** declares as follows:

1. I am the current Administrator of the Public Safety Personnel Retirement System (PSPRS) for the State of Arizona.

2. PSPRS is a retirement system for certain full-time peace officers and full-time firefighters in the State of Arizona.

3. I have served as Administrator of PSPRS since August 29, 2005.

4. As the Administrator of PSPRS, I have extensive first-hand knowledge of the organization and administration of PSPRS.

5. PSPRS is a "defined benefit plan," which means benefits are determined by a statutory formula: Beneficiaries (or "members") under the PSPRS system receive a pension based on their number of years of service and the highest three consecutive years of salary in the last twenty years of service preceding retirement.

6. PSPRS is also an "agent multiple-employer" retirement plan.

7. As an "agent multiple-employer" retirement plan, separate accounts are kept by each employer in PSPRS.

8. Employers are generally departments of cities and counties in Arizona.

9. At any given time, there are between 240-250 separate employers contributing to PSPRS.

10. The City of Phoenix Police Department is an employer in PSPRS.

11. Each individual employer, including the City of Phoenix, is alone responsible for financing the payment of pension benefits to its members from the employer's separate account in PSPRS.

12. In other words, although monies in PSPRS are pooled for investment purposes, benefit payments from PSPRS are not "shared" by all employers in the system; rather, benefits are paid by each employer from the employer's separate account.

13. Apart from investment obligations and administration, neither the State or Arizona, nor PSPRS, is responsible for raising revenue for pension payments from PSPRS.

14. Additionally, employer contributions rates are different for each employer in the system and change every fiscal year based on actuarial valuation that is done for each employer's employee group within the system.

15. If more or higher benefits are paid, the employer contribution rate will increase accordingly, to cover the liability associated with the higher benefit amounts.

16. Therefore, if the City of Phoenix Police Department has higher pension payments than anticipated, then the City of Phoenix's contributions to PSPRS, generated through taxation on Phoenix residents or otherwise, will increase.

17. Each employer within PSPRS, including the City of Phoenix, have their own accountants, auditors, and legal counsel to ensure employee and employer contributions to PSPRS are consistent with state statute.

18. PSPRS does not generally audit employers, including the City of Phoenix or the Phoenix Police Department.

19. Each employer group in PSPRS has its own local board.

20. A "local board" is a five member board composed of three persons appointed by the employer and two persons who are elected by the employees of the

employer group.

21. Pursuant to A.R.S. § 38-847(D)(1), local boards within PSPRS have the duty to "decide all questions of eligibility and service credits, and to determine the amount, manner and time of payment of any benefits under the system."

22. The City of Phoenix Police Pension Board is the local board for the Phoenix Police Department.

23. The City of Phoenix determines what items count as pensionable salary for Phoenix employees who participate in PSPRS.

24. PSPRS does not make determinations for any employer, including the City of Phoenix, regarding what items of compensation count as pensionable salary.

25. The City of Phoenix Police Pension Board approves pensionable salary and the specific pension amounts for each Phoenix Police Department employee under PSPRS.

26. The City of Phoenix Police Pension Board reports the pension amount it approves directly to PSPRS.

27. Attached as **Exhibit 1** is Form P11, which is used by all local boards, including the City of Phoenix Police Pension Board, to calculate and report the pension benefits for regular service retirements of their members to PSPRS.

28. Section A of **Exhibit 1** is where local boards, including the City of Phoenix Police Pension Board, enters pensionable compensation for their members.

29. Pensionable compensation as reported in Section A of **Exhibit 1** is reported to PSPRS directly by the local boards, including the City of Phoenix Police Pension

Board.

30. The pensionable compensation amounts reported by the local board, including the City of Phoenix Police Pension Board, is not itemized as to the components of compensation. Therefore, if an employer were to calculate a pension amount that included, for example, payment in lieu of vacation leave, PSPRS would not see that itemization on **Exhibit 1**.

31. PSPRS relies on each employer and its local board to report pensionable compensation consistent with a proper interpretation of state statute.

32. When PSPRS receives **Exhibit 1** from the employer, it records the pension amount listed and then issues a check to the identified beneficiary in the amount indicated by the employer from the employer's separate account in PSPRS.

33. It is the duty of employers in PSPRS, including the City of Phoenix, and local boards in PSPRS, including the City of Phoenix Police Pension Board, to determine the amount, manner, and time of payment of pension benefits, and to conclude that such payments comply with all applicable laws.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

James Hacking

Dated: October 7, 2013

Exhibit 1

Exhibit 1

PUBLIC SAFETY PERSONNEL RETIREMENT SYSTEM
3010 E. Camelback Rd., Suite 200, Phoenix, Arizona 85016
(602) 255-5575 FAX (602)296-2369 www.psprs.com

FORM P11
08/12

SERVICE RETIREMENT BENEFIT CALCULATIONS
A.R.S. Section 38-845

USE THIS PAGE FOR ALL SERVICE RETIREMENTS AND SURVIVING SPOUSE, GUARDIAN AND ELIGIBLE CHILD BENEFITS FOR DECEASED MEMBERS WHO WERE RECEIVING SERVICE RETIREMENTS

______________________ Member Name ______________________ Employer

BIRTH DATE: ______________ SOCIAL SECURITY NUMBER: ______________

PRIOR SERVICE From: ________ Through: ________ = ________ Years

Less Non-Credited Service From: ________ Through: ________ = ________ Years

SERVICE DATES From: ________ Through: ________ = ________ Years

LENGTH OF CREDITED SERVICE: ________ Years ________ Days

AMOUNT OF FINAL CONTRIBUTION TO PSPRS: $ ________ for Pay Period Ending ________

A. COMPENSATION: List total compensation for the highest three consecutive years within the last twenty completed years of credited service (if periods of LWOP and/or Workers' Compensation are included, please indicate):

YEAR			AMOUNT	YEAR			AMOUNT
	through		$		through		$
	through		$		through		$
	through		$		through		$
	through		$		through		$

B. TOTAL AMOUNT of highest three consecutive Years.............................. $ ________

C. AVERAGE MONTHLY COMPENSATION - LINE B ÷ 36 months:.............................. $ ________

D. For retirement with 20 years of credited service but less than 25 years of credited service:

1. Line C x 50%.............................. $ ________
2. PLUS 2% of Line C for each year of credited service over 20 years.......... $ ________
3. TOTAL MONTHLY BENEFIT:.............................. $ ________

E. For retirement with 25 or more years of credited service:

1. Line C x 50%.............................. $ ________
2. PLUS 2.5% of Line C for each year of credited service over 20 years (MAX – 12 years).............................. $ ________
3. TOTAL MONTHLY BENEFIT:.............................. $ ________

F. For retirement with 20 years of service but less than 20 years of credited service:

1. Line C x 50%.............................. $ ________
2. MINUS 4% of Line F1 for each year of credited service under 20 years... $ ________
3. TOTAL MONTHLY BENEFIT:.............................. $ ________

G. Surviving Spouse or Guardian Benefit: 4/5 of Line D3, E3 or F3, whichever is applicable......... $ ________

H. Eligible Child Benefit: 1/10 of Line D3, E3 or F3, whichever is applicable (MAX – 2 child shares)... $ ________

CALCULATED BY: ______________________ **DATE:** ________

PHONE NUMBER: ( ) -