

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is entered into on July 14, 2021 by and between FORTY-NINER SHOPS, INC., CALIFORNIA STATE UNIVERSITY LONG BEACH (“Forty-Niner Shops” or “Forty-Niner Shops/CSULB”), CHRISTIANNE M. TABELLARIO, and CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (“CalPERS”), regarding the final compensation calculation including Bonus Pay as reported by Forty-Niner Shops/CSULB to CalPERS. The listed entities and individuals may be individually referred to herein as a “Party” or collectively as the “Parties.”

RECITALS

1. CalPERS manages a defined benefit plan for California state employees and employees of contracting public agencies. The amount of a member’s service retirement allowance is calculated by applying a percentage figure based upon member’s age on the date of retirement, to member’s years of service and member’s “final compensation.” Final compensation is a function of member’s highest compensation earnable which consists of member’s payrate and any special compensation. In computing a member’s retirement allowance, CalPERS may review salary reported by the employer for the member to ensure that only those items allowed under California Public Employees’ Retirement Law (PERL) will be included in member’s final compensation for purposes of calculating retirement allowance.
2. Forty-Niner Shops, Inc., California State University Long Beach is a public agency that contracts with CalPERS to provide retirement benefits for its eligible employees. The provisions of respondent Forty-Niner Shops’ contract with CalPERS are contained in the PERL. (Gov. Code, § 20000 et seq.)
3. Forty-Niner Shops’ Incentive Plan was terminated as of June 30, 2020.
4. Forty-Niner Shops did not report Bonus Pay for its employees in fiscal year 2019-2020. Forty-Niner Shops was informed by CalPERS to not include Bonus Pay for the period July 1, 2019 through June 30, 2020 in the calculation of compensation for its employees. Instead, Forty-Niner Shops paid the bonus to employees in cash.
5. Item one of the Incentive Plan Summary states inter alia: The purpose of this Incentive Plan Summary is to describe a Plan for eligible employees of Forty-Niner Shops, Inc. “which shall award cash incentive payments for the accomplishment of superior performance overall....”
6. Item two of the Incentive Plan Summary states inter alia: “The plan objectives are to: ... Strengthen the Organization’s emphasis on reward for superior performance.”

7. Item seven of the Incentive Plan Summary states inter alia:

The incentive award will be based on two components. Twenty-five percent (25%) of the potential incentive will be based on the Organization's financial performance. The other seventy-five percent (75%) will be based on individual management objectives (MBO's).

MBO's will be agreed upon each year by the Participant and their manager and approved by the General Manager. One point will be assigned to each MBO. The individual's total number of MBO's will equal the denominator and the number of individual MBO's successfully achieved will be the numerator. The resulting fraction will determine the balance of the incentive award calculation. There will be a mid-year review in which renegotiation of goals may be appropriate.

8. Christianne M. Tabellario became a member of CalPERS on September 8, 1987, through her employment with Forty-Niner Shops. At the time of her retirement on April 30, 2016, she was employed as a Retail Manager II. She is a local miscellaneous member of CalPERS.

9. CalPERS Office of Audit Services (OFAS) conducted an audit of Forty-Niner Shops to determine whether its retroactive special compensation adjustments were in compliance with the PERL. The review was limited to the examination of a sample of employee records for the period of January 1, 2017, through December 31, 2019.

10. By letter dated April 14, 2020, OFAS provided a draft report of its review of retroactive special compensation adjustments (RSCA) to Forty-Niner Shops for review and provided until April 28, 2020 to send a written response to the draft report. The draft report states in pertinent part:

Results in Brief

	Exception	Area	Observation
1	Not Reportable	Bonus Pay	The Employer reported Bonus Pay for one sampled active employee that was not based on the employee's superior performance. Specifically, the Employer's bonus plan specifies that the employee is eligible to receive 15 percent of their annual base pay as a bonus. However, the plan was not tied to goals and the bonus pay was not for superior performance. The plan specifies that 25 percent of the bonus is based on the Employer's financial performance while the remaining 75 percent is based on Individual Management by Objectives (MBO). The MBO assignments were not tied to goals and were not for superior performance. The Employer also does not complete annual performance appraisals to demonstrate superior performance. The Employer reported separate RSCA transactions for Bonus Pay for the employee in the amount of \$14,292.66 for the period June 20, 2016 through June 18, 2017 and \$17,319.35 for the period June 19, 2017 through June 17, 2018. CCR section 571(a) stipulates Bonus Pay is compensation to employees for superior performance. The Employer believed the amount was for superior performance. When items of special compensation are misreported, the employees' member contributions and retirement benefits may be impacted.

Recommendation and Criteria

The Employer should ensure RSCA transactions are reported in compliance with Government Code section 20636 and CCR section 571. The Employer should work with the CalPERS Employer Account Management Division to identify all active and retired members impacted by this incorrect reporting and to determine what adjustments, if any, are needed to correct the improperly reported special compensation amounts. To the extent that any amounts of pay were improperly included in the retirement allowance of retired members, a correction to the retirement allowance should be made pursuant to Government Code section 20160. [¶] . . . [¶]

11. On April 20, 2020, Forty-Niner Shops disagreed with the audit finding on Bonus Pay.
12. On June 25, 2020, CalPERS' Audit Office issued its final report on the Audit of Forty-Niner Shops and identified Bonus Pay as not in compliance with the PERL.
13. On July 2, 2020, CalPERS sent an initial notification of compliance and resolution to Forty-Niner Shops which included a resolution action plan to bring the Bonus Pay observation into compliance.
14. By email dated November 19, 2020, Forty-Niner Shops disputed the Bonus Pay observation and refused to comply with the recommended resolution.
15. CalPERS reviewed the compensation reported by Forty-Niner Shops on behalf of its retirees and determined: (1) that the Bonus Pay was not based on an employee's superior performance; (2) that there is no system in place to determine how an employee achieves superior performance based on performance evaluation; and (3) that the reported Bonus Pay does not meet the definition of Special Compensation as provided in Government Code section 20636 and CCR section 571. Accordingly, CalPERS excluded Bonus Pay from the calculation of certain retirees' final compensation.
16. On December 3, 2020, CalPERS sent a formal determination letter to Forty-Niner Shops and informed them of their appeal rights.
17. On December 3, 2020, Forty-Niners Shops appealed CalPERS' determination.
18. On January 22, 2021, CalPERS sent a formal determination letter to certain retirees from Forty-Niner Shops regarding their retirement allowance and informed them of their appeal rights. In addition, respondent members were notified that CalPERS is seeking to collect the overpayment as a result of its determination.
19. On February 17, 2021, Retiree Tabellario filed her appeal.

AGREEMENT

1. Recitals. The recitals set forth above are true and correct and are hereby fully incorporated by reference into this Agreement.
2. Settlement.
 - A. The Parties agree that the reported Bonus Pay through June, 2019 will be included in the calculation of the final compensation for the purpose of determining the CalPERS retirement allowance for employees who have or

will retire from Forty-Niner Shops, including retiree Tabellario (collectively "Forty-Niner Shops' retirees");

- B. CalPERS agrees it will not reduce the retirement allowance of the Forty-Niner Shops' retirees with respect to their final compensation attributable to Bonus Pay;
- C. CalPERS agrees it will not collect overpayment of retirement allowance from the Forty-Niner Shops' retirees' final compensation attributable to the Bonus Pay;
- D. Forty-Niner Shops agrees to report and/or not reverse Bonus Pay as it was paid pursuant to the Incentive Plan, and reported to CalPERS for all Forty-Niner employees through June 2020; and
- E. CalPERS agrees it will accept reported Bonus Pay paid through the Incentive Plan through June 2020 as reported by Forty-Niner shops for all employees.

3. No Further Action.

Each Party to this Agreement agrees not to bring any action or maintain any new or further proceedings against the other under any grievance or arbitration procedure or with any court, neutral or administrative agency, or in any other forum whatsoever, by reason of any claim, loss, liability, demand or cause of action against the other related in any way to this Agreement, except to enforce the terms of this Agreement. The Parties represent they have not filed or initiated any such other actions or proceedings.

4. No Change to Other Retirement Benefits.

Nothing in this Agreement affects service credit for the Forty-Niner Shops' retirees, nor otherwise diminishes his/her entitlement to continuing retirement benefits from CalPERS, including annual cost of living increases that may otherwise apply.

5. Waiver, Discharge and Release.

The Parties to this Agreement generally and specifically agree that each shall fully and forever discharge and release all claims, demands, debts, obligations, damages, liabilities and causes of action, whether now known or unknown, which either Party has against the other Party arising out of the facts in this case. For purposes of this provision, "Party" or "Parties" shall include, the Parties and each of their respective past, present, and future officers, directors, board members, agents, assigns, successors, personal representatives, attorneys, administrators, receivers, trustees, and anyone acting by or on behalf of such persons or parties.

6. Waiver of California Civil Code Section 1542.

Section 1542 of the California Civil Code provides as follows: **A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

Each Party fully understands and expressly waives any and all respective rights under, and the benefits of, Section 1542 of the California Civil Code with respect to calculation of the retirees' final compensation.

7. Agreement not an Admission of Liability.

This Agreement is a compromise of disputed claims and fully and finally settles all claims between the Parties. Neither the consideration hereunder nor anything contained in this Agreement shall be interpreted or construed to be an admission of liability on the part of any Party named herein. This Agreement is not to be construed as an admission of guilt or fault on the part of any Party to the Agreement.

8. Sufficiency of Consideration.

The sufficiency of the consideration for the mutual covenants, obligations, and agreements contained in this Agreement is acknowledged by the Parties.

9. Successors and Assigns.

All terms and conditions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by, the Parties and their respective representatives, successors and assigns. Each Party represents and warrants that he/she/it has not assigned or transferred to any person or entity any of the rights, claims, and demands released or discharged under this Agreement. Any such assignment or transfer shall be null and void from inception.

10. Entire Agreement.

This Agreement contains the entire agreement between the Parties relating to its subject matter and all prior and contemporaneous agreements, understandings, representations, and statements, both oral and written, are merged herein. This Agreement is complete, exclusive, and the final embodiment of the Parties' intent. The Agreement may be modified only in a written document signed by all Parties. All prior agreements, understandings, oral agreements and writings are expressly superseded hereby and are of no further force or effect.

11. Modification.

This Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by the Parties and/or their authorized representatives.

12. Severability.

Should any provision of this Agreement be declared by any court of competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity and enforceability of the remaining parts, terms or provisions shall not be affected thereby, and said illegal, unenforceable or invalid part, or provision shall be deemed not to be a part of this Agreement provided that the material consideration received by either Party is not defeated.

13. Governing Law and Venue.

This Settlement Agreement and General Release shall be construed and enforced with, and governed by, the laws of the State of California. Any action or proceeding brought for the purpose of enforcing this Agreement shall be governed by the laws of the State of California, including but not limited to the Public Employees' Retirement Law, California Government Code sections 20000, et seq. Any dispute under this Agreement shall be resolved only in a legal proceeding filed in the Superior Court for the State of California, County of Sacramento.

14. Ambiguities not Held Against Drafter.

This Agreement having been freely and voluntarily negotiated by the Parties, the rule that ambiguous contractual provisions are construed against the drafter of the provision shall be inapplicable to this Agreement. The Parties have participated jointly in the negotiation and preparation of this Agreement, and each Party has had the opportunity to obtain the advice of legal counsel and to review and comment upon this Agreement. This Agreement shall be construed as if the Parties jointly prepared it, and neither in favor of nor against either Party.

15. Advice of Counsel/Representation.

All Parties acknowledge and agree they are represented by counsel, or have the right to be represented by counsel, in connection with the drafting and execution of this Agreement and that they have read and fully understand the terms and conditions of the Agreement.

16. Effective Date.

This Agreement is expressly made conditional upon its execution by Forty-Niner Shops/CSULB, Christianne M. Tabellario, and CalPERS, and the effective date of this Agreement is the first date on which all parties have signed this Agreement.

17. Execution in Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which shall together constitute one and the same instrument. Copies of each signed counterpart may be used in lieu of the originals for any purpose. Facsimile or scanned signatures of the Parties shall have the effect of original signatures.

BY AFFIXING HIS OR HER SIGNATURE BELOW, EACH OF THE PERSONS SIGNING THIS AGREEMENT REPRESENTS THAT HE/SHE HAS READ AND UNDERSTANDS THIS AGREEMENT, THAT HE/SHE IS AUTHORIZED TO SIGN THIS AGREEMENT, AND THAT THE PARTY ON BEHALF OF WHOM HE/SHE SIGNS THIS AGREEMENT AGREES TO BE BOUND BY ITS TERMS.

IN WITNESS THEREOF, the Parties have signed this Agreement the day and year written next to their signatures below in a manner fully binding upon them.


THE REST OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

By: _____
Christianne M. Tabellario

Date: _____

By: Robert Dewit
Robert de Wit
General Manager/CEO
Forty-Niner Shops, CSULB

Date: 7/13/2021

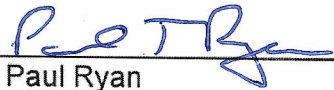
By: 
Renee Ostrander
Division Chief, Employer Account Management Division
CalPERS

Date: 7/15/2021

Approved as to Form:

By: _____
Kirsten Scott
Renaker Hasselman Scott LLP
Attorneys for Christianne M. Tabellario

Date: _____

By: 
Paul Ryan
Constangy Brooks Smith & Prophete LLP
Attorneys for Forty-Niner Shops/CSULB

Date: 7/20/2021

By: 
Elizabeth Yelland
Senior Staff Council, CalPERS

Date: 7/15/2021

By: Christianne M Tabellario
Christianne M. Tabellario

Date: July 15, 2021

By: _____
Robert de Wit
General Manager/CEO
Forty-Niner Shops, CSULB

Date: _____

By: _____
Renee Ostrander
Division Chief, Employer Account Management Division
CalPERS

Date: _____

Approved as to Form:

By: Kirsten Scott
Kirsten Scott
Renaker Hasselman Scott LLP
Attorneys for Christianne M. Tabellario

Date: 7/15/2021

By: _____
Paul Ryan
Constangy Brooks Smith & Prophete LLP
Attorneys for Forty-Niner Shops/CSULB

Date: _____

By: _____
Elizabeth Yelland
Senior Staff Council, CalPERS

Date: _____

WAIVER AND DISMISSAL

CalPERS
Legal Office
PO Box 942707
Sacramento, CA 94229-2707

In exchange for CalPERS' waiver of any claims regarding my receipt of Bonus Pay compensation (pursuant to Forty-Niner Shops Inc. Incentive Plan Summary) and its inclusion in the calculation of my retirement allowance, and in exchange for other consideration in this Agreement, I hereby waive my right to assert in any forum, whether in law or equity, any future claim that is related to the inclusion of Bonus Pay in the calculation of my retirement allowance.

Name:
Address:
SSN or CalPERS ID:

Date: _____

