

Council Meeting of  
July 19, 2011

Honorable Mayor and Members  
of the City Council  
City Hall  
Torrance, California

**SUBJECT: Adopt RESOLUTION approving City of Torrance PARS Replacement Benefit Plan and Replacement Benefit Trust Agreement.**

**Expenditure: \$800**

### **RECOMMENDATION**

Recommendation of the City Treasurer that the City Council:

1. Adopt a **RESOLUTION** approving the City of Torrance PARS Replacement Benefit Plan and Replacement Benefit Trust;
2. Authorize the City Treasurer to execute the appropriate documents; and
3. Take whatever additional actions necessary to maintain full participation of the City in Public Agency Retirement Services (PARS) and to ensure that retirees who participate in PARS receive the full retirement benefits to which they would otherwise be eligible.

### **FUNDING**

Funding for this project is available from the plan.

### **BACKGROUND**

At the City Council meeting of June 21, 2005, your Honorable Body adopted a resolution implementing the PARS Retirement Enhancement Plan (PARS) for employees covered by the Torrance Professional and Supervisory Association, Engineers and Fiscal employee groups. The Plan is a qualified defined benefit plan that creates a supplement retirement benefit for affected employees. The Plan's cost is fully funded by the affected employees.

### **ANALYSIS**

Section 415(b) of the Internal Revenue Code sets limits on benefits for tax-qualified retirement plans. The current 415(b) limit for normal retirement age, defined as 62 to 65 is set at \$195,000. Should the retirement occur prior to age 62 the amount is adjusted (lower) to the actuarial equivalent as if the member retired at the normal retirement age. The actuarial adjustment not only factors age but type of employee (safety/non-safety), years of service, hire date, cost of living adjustments, interest rate, retirement option, plan amendments, etc. PARS has provided an "Age" table for the City of Torrance for regular employees which shows the adjustments to the IRC limit (attachment A).

The plan's purpose is to "make whole" the retirement allowances limited by Section 415(b) of the IRC. Essentially, the retirement benefit that exceeds the limit set by 415(b) is paid by the above Benefit Plans. California Public Employees Retirement System (PERS) has a similar plan.

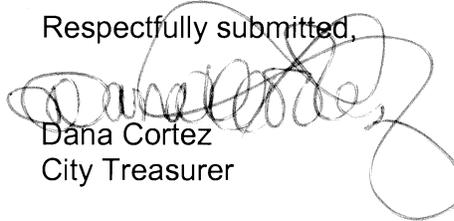
The City currently has two retirees (safety) receiving benefits under PERS and the City was notified from PARS that one retiree under PARS exceeds 415(b) limit as calculated by PARS. The PARS retiree did not exceed the 415(b) limit under PERS. PERS and PARS use different actuarial assumptions and have different thresholds. While, PERS does not produce an "age" table as PARS does but PERS reviews each case once a threshold is met. The PARS actuarial 415(b) limit calculations appear to be substantially below PERS. The PARS "Replacement Benefit Trust" would be a cost to PARS plan and funded by the employees participating in PARS.

The City Treasurer, who is the Plan Administrator, recommends adoption of a Replacement Benefit Plan and a Replacement Benefit Trust to ensure that employees receive the full benefits to which they are entitled.

The City Manager's Office met on two separate occasions with the Torrance Professional and Supervisory Association (TPSA), and the Engineers and Fiscal employee groups. Also in attendance of the meetings were the City Treasurer and the Finance Director. During the meetings, the employee groups were provided with a briefing regarding the required changes and concurred with the recommended action.

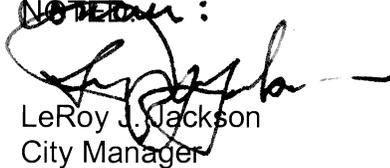
The only cost associated with the recommended action is approximately \$800 in one-time set-up charges which will be paid out of the plan which is funded by the affected employees benefitting from PARS.

Respectfully submitted,



Dana Cortez  
City Treasurer

NOTED:



LeRoy J. Jackson  
City Manager

Attachments:

- A. RESOLUTION
- B. City of Torrance Replacement Benefit Plan
- C. City of Torrance Replacement Benefit Trust

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION BY THE TORRANCE CITY COUNCIL  
AUTHORIZING THE ESTABLISHMENT OF THE  
INTERNAL REVENUE CODE SECTION 415 REPLACEMENT BENEFIT PROGRAM  
IN CONNECTION WITH THE  
CITY OF TORRANCE PARS RETIREMENT ENHANCEMENT PLAN**

**WHEREAS**, the City of Torrance ("City") is a member of the Public Agency Retirement System ("PARS") for the purpose of providing tax qualified retirement benefits; and

**WHEREAS** pursuant to Resolution No. 2005-37 adopted June 21, 2005, the City adopted the City of Torrance PARS Retirement Enhancement Plan (the "Plan"), a qualified governmental plan for the benefit of eligible employees; and qualifying under the relevant sections of the Internal Revenue Code §§ 401(a) and 501(a) (the "Code") and California Government Code § 53215 et seq., and;

**WHEREAS** it has been determined that certain employees entitled to benefits under the Plan will have benefits at the time of payment reduced by the limitation on benefits imposed by Section 415 of the Code; and

**WHEREAS** the City deems it to be in the best interest of the City and the Plan to implement a replacement benefit program under Internal Revenue Code Section 415, to provide employees entitled to receive benefits under the Plan the actuarial equivalence of the benefits that would have been payable under the Plan except for the limitations on benefits imposed by Section 415 of the Code; and

**WHEREAS** contributions necessary to fund benefits under the replacement benefit program are not in addition to, but reduced from the City's ongoing contributions to fund the underlying City of Torrance PARS Retirement Enhancement Plan.

**NOW, THEREFORE BE IT RESOLVED THAT:**

1. The City Council does hereby adopt the City of Torrance Replacement Benefit Program, including the City of Torrance Replacement Benefit Trust Agreement, effective \_\_\_\_\_, 2011; and
2. The City Council does hereby appoint the City Treasurer or his/her successor or his/her designee as the City's Plan Administrator for the City of Torrance Replacement Benefit Program; and
3. The City's Plan Administrator is hereby authorized to execute the PARS legal documents on behalf of the City to implement the Code Section 415 replacement benefit program, and to take whatever additional actions are necessary to maintain plan compliance with relevant regulations issued or as may be issued by the federal or state government agencies.

Introduced, approved and adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

By \_\_\_\_\_  
City Attorney

\_\_\_\_\_  
City Clerk

STATE OF CALIFORNIA     )  
COUNTY OF LOS ANGELES    )  
CITY OF TORRANCE            )

I, \_\_\_\_\_, City Clerk of the City of Torrance, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Torrance at a regular meeting of said council held on the \_\_\_\_\_ day of \_\_\_\_\_, 2011 by the following roll call vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

\_\_\_\_\_  
City Clerk of the City of Torrance

**CITY OF TORRANCE**  
**PARS REPLACEMENT BENEFIT PROGRAM**  
**EFFECTIVE JANUARY 1, 2011**

DEFINED BENEFIT PLAN

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## ARTICLE I

### PURPOSE

The purpose of this Plan is to supplement the benefits of certain Employees under the City of Torrance Public Agency Retirement System (PARS) Retirement Enhancement Plan (the “**Supplemental Retirement Plan**”) to the extent that such benefits are reduced by the limitations on benefits imposed by Section 415 of the Internal Revenue Code of 1986 as amended (the “**Code**”).

## ARTICLE II

### PARTICIPATION

Those Employees who are participants in the Supplemental Retirement Plan and whose benefits at the time of payment are reduced by the limitation on benefits imposed by Section 415 of the Code shall be Participants hereunder.

## ARTICLE III

### BENEFITS; VESTING

#### 3.1 Amount of Benefit.

The value of the benefits which each Participant shall be entitled to receive under this Plan shall be equal to the Actuarial Equivalent of the difference between the actual benefits of such Participant under the Supplemental Retirement Plan and the Actuarial Equivalent of the benefits that would have been payable to the Participant under such plan except for the limitations on benefits imposed by Section 415 of the Code.

#### 3.2 Payment of Benefit.

The benefits payable under this Plan shall be payable to the Participant or to any other person who is receiving or entitled to receive benefits with respect to the Participant (the “**Distributee**”) under the Supplemental Retirement Plan. The benefits will be paid in the same form, at the same times and for the same period as benefits are paid with respect to the Distributee under the Supplemental Retirement Plan. Notwithstanding the foregoing, in the event that the present value of the Actuarial Equivalent of the benefit to be paid under this Plan (as determined by the Employer upon the advice of the actuary for PARS) at the commencement

of payment is \$5,000 or less, the Employer may, in its discretion, elect to pay the benefit in a single lump sum.

**3.3 Vesting.**

A Participant will be fully vested in his Retirement Benefit upon meeting the requirements of Article II.

**3.4 Actuarial Equivalence.**

For the purpose of establishing Actuarial Equivalence, the mortality assumption shall be 1983 GAM and the interest assumption shall be 6% per annum.

**ARTICLE IV**

**ADMINISTRATION AND AMENDMENT OF THE PLAN**

**4.1 Rules and Regulations.**

The Employer has full discretionary authority to supervise and control the operation of this Plan in accordance with its terms and may make rules and regulations for the administration of this Plan that are not inconsistent with the terms and provisions hereof. The Employer shall determine any questions arising in connection with the interpretation, application or administration of the Plan (including any question of fact relating to age, employment, compensation or eligibility of employees) and its decisions or actions in respect thereof shall be conclusive and binding upon any and all persons and parties.

**4.2 Non-Alienation of Benefits.**

Except as otherwise provided in the Plan, no right or benefit under the Plan shall be subject to anticipation, alienation, sale, assignment, pledge, encumbrance or charge, and any attempt to anticipate, alienate, sell, assign, pledge, encumber or charge such right or benefit shall be void. No such right or benefit shall in any manner be liable for or subject to the debts, liabilities or torts of a Participant or other benefit recipient. In addition, no right of a Participant or other benefit recipient under the Plan is transferable by inter vivos gift or testamentary disposition.

#### **4.3 Funding.**

The Plan shall be unfunded, and benefits under the Plan shall be paid from the general or retirement fund of the Employer through a Replacement Benefit Plan Fund hereby established for payment of administration expense and benefit payments, subject to the claims of the Employer's general creditors. No person other than the Employer shall by virtue of the provisions of the Plan have any interest in such amounts. Title to and beneficial ownership of any assets, whether cash or other investments which the Employer may earmark to pay any amount under the Plan, shall at all times remain with the Employer, and Participants and any other persons entitled to benefits hereunder shall not have any property interest whatsoever in any specific assets of the Employer. The obligation of the Employer to make payments pursuant to the Plan is contractual only. No Participant or other person entitled to benefits hereunder shall have a preferred claim or lien on any assets of the Employer.

#### **4.4 Taxes.**

The Plan Administrator shall make appropriate arrangements to deduct from all amounts paid under the Plan any taxes required to be withheld with respect to the Plan by any government or governmental agency.

#### **4.5 Amendment and Termination.**

The Employer shall have the right to amend the Plan (other than this section) or terminate the Plan at any time. If the Plan is terminated, the actuarial equivalent present value of any remaining benefits payable to a Participant or other person, increased by an amount determined by the Employer to permit approximately the same after-tax payout over time to Participants as would have been realized in the absence of such termination, shall be paid in a lump sum 30 days after the termination of the Plan.

#### **4.6 Compliance with Laws.**

It is the intention that this Plan be a "qualified governmental excess benefit arrangement" within the meaning of Section 415(m) of the Code, and may at any time be amended to comply with the Code requirements to maintain such qualification and status.

**ARTICLE V****DEFINITIONS**

Whenever the following terms are used in the Plan, with the first letter capitalized, they shall have the meanings first specified below.

“**Code**” shall mean the Internal Revenue Code of 1986 as amended.

“**Employer**” shall mean the City of Torrance that has adopted this Plan.

“**Employee**” shall mean an employee of the Employer.

“**Normal Retirement Age**” shall mean sixty-two (62) years of age.

“**Participant**” shall mean those Employees eligible for participation in the Plan.

“**Plan**” shall mean this City of Torrance PARS Replacement Benefit Program, as amended.

“**Retirement Benefits**” shall mean the benefits payable to the Participant following retirement, as described in Article III.

“**Supplemental Retirement Plan**” shall mean the City of Torrance Public Agency Retirement System (PARS) Retirement Enhancement Plan, as amended.

**CITY OF TORRANCE  
PARS REPLACEMENT BENEFIT PROGRAM**

The City of Torrance PARS Replacement Benefit Program is hereby adopted effective January 1, 2001.

By: \_\_\_\_\_  
Dana Cortez

Title: City Treasurer

Date: \_\_\_\_\_

**CITY OF TORRANCE**  
**PARS REPLACEMENT BENEFIT PROGRAM TRUST AGREEMENT**

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TRUST UNDER  
THE CITY OF TORRANCE PARS REPLACEMENT BENEFIT PROGRAM

This Trust Agreement (the "Trust Agreement" or "Trust") is made by and between the City of Torrance (the "Employer"), Public Agency Retirement Services ("PARS" and/or "Trust Administrator") and UNION BANK, N.A., a national banking association (the "Trustee"), and shall be effective upon the Trustee's receipt of assets to be held in trust hereunder.

**PURPOSE**

(a) WHEREAS, the Employer has adopted the plan or plans attached as Exhibit A or which subsequently may be designated in writing by the Employer (the "Plan") pursuant to which the Employer expects to incur unfunded liabilities with respect to certain employees of the Employer.

(b) WHEREAS, Employer wishes to establish a trust (hereinafter called "Trust") and to contribute to the Trust assets that shall be held therein, subject to the claims of Employer's creditors in the event of Employer's Insolvency, as herein defined, until paid to Plan participants in such manner and at such times as specified in the Plan;

(c) WHEREAS, it is the intention of the parties that this Trust shall constitute an unfunded arrangement and shall not affect the status of the Plan as an unfunded plan maintained for the purpose of providing deferred compensation for a select group of employees;

(d) WHEREAS, it is the intention of Employer to make contributions to the Trust to provide itself with a source of funds to assist it in the meeting of its liabilities under the Plan;

NOW, THEREFORE, the parties do hereby establish the Trust and agree that the Trust shall be comprised, held and disposed of as follows:

## ARTICLE I

### ESTABLISHMENT OF TRUST

- 1.1 Establishment of Trust. The Employer hereby deposits with Trustee in Trust a sum of money which shall become the principal of the Trust to be held, administered and disposed of by Trustee as provided in the Trust Agreement.

### REVOCABILITY

- 1.2 Revocability. The Trust hereby established shall be revocable by Employer.
- 1.3 Grantor Trust. The Trust is intended to be a grantor trust, of which Employer is the grantor, within the meaning of Subpart E, Part I, Subchapter J, Chapter 1, Subtitle A of the Internal Revenue Code of 1986, as amended, and shall be construed accordingly.
- 1.4 Trust Assets. The principal of the Trust, and any earnings thereon shall be held separate and apart from other funds of Employer and shall be used exclusively for the uses and purposes of Participants and Employer's general creditors as herein set forth. Plan participants and beneficiaries of deceased participants (hereinafter called "Participants") shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plan and this Trust Agreement shall be mere unsecured contractual rights of Participants against Employer. Any assets held by the Trust will be subject to the claims of Employer's general creditors under federal and state law in the event of Insolvency, as defined in Article XI herein.
- 1.5 Payments to Employer. The Employer shall maintain the right and power to direct Trustee to return to Employer or to divert to others any of the Trust assets before all payment(s) of benefits have been made to Participants pursuant to the terms of the Plan.
- 1.6 Signing Authority; Administrator. The Employer shall certify in writing to the Trustee the names and specimen signatures of all those who are authorized to act as or on behalf of the Employer, and those names and specimen signatures shall be updated as necessary by a duly authorized official of the Employer. The Employer shall promptly notify the Trustee if any person so designated is no longer authorized to act on behalf of the Employer. Until the Trustee receives written notice that a person is no longer authorized to act on behalf of the Employer, the Trustee may continue to rely on the Employer's designation of such person.

- 1.7 Acceptance of Assets; Trust Composition. All contributions or transfers shall be received by the Trustee in cash or in any other property acceptable to the Trustee. The Trust shall consist of the contributions and transfers received by the Trustee, together with the income and earnings from them and any increments to them. The Trustee shall hold, manage and administer the Trust in accordance with this Trust Agreement without distinction between principal and income.
- 1.8 Trust Contributions. Employer, in its sole discretion, may at any time, or from time to time, make additional deposits of cash or other property in trust with Trustee to augment the principal to be held, administered and disposed of by Trustee as provided in this Trust Agreement. Neither Trustee nor any Participant shall have any right to compel such additional deposits.
- 1.9 No Duty of Trustee to Enforce Collection. Notwithstanding anything herein to the contrary, Trustee shall have no authority or obligation to enforce the collection of any contribution or transfer to the Trust.
- 1.10 Plan Administration. The Employer and not the Trustee shall be responsible for administering the Plan (including without limitation determining the rights of the Employer's employees to participate in the Plan, determining any Participant's right to benefits under such Plan), and issuing statements to Participants of their interest in the trust and Plan. The Employer may delegate such responsibilities to a record keeper.
- 1.11 Participant Accounts. If required, the Employer shall maintain in an equitable manner a separate account for each Participant under the Plan ("Account") in which it shall keep a record of the share of such Participant under such Plan in the Trust. The Employer may appoint a record keeper to maintain such Accounts. A Participant's Account under the Plan shall represent the portion of the Trust allocated to provide such Participant benefits under such Plan. If the Trustee is directed by the Employer to segregate the Trust into separate Accounts for each Participant, at the time it makes a contribution to the Trust, the Employer shall certify to the Trustee the amount of such contribution being made in respect of each Participant under each Plan.
- The Trustee may rely on information provided to the Trustee by the Employer and the Trustee's and Employer's determination of Account values shall be conclusive and binding on all interested parties.
- 1.12 Tax Reporting. The Trustee shall be responsible for individual tax reporting and withholding as directed by the Employer. The Employer agrees to indemnify and defend the Trustee against any liability for the payment of such taxes, interest or penalties resulting from or related to the Trust.

- 1.13 Trust Administrator. The Trust Administrator shall be Public Agency Retirement Services.

## ARTICLE II

### INVESTMENTS

- 2.1 Employer Directs Investments. Except as provided in Section 2.2 below, the Employer shall have all power over, and responsibility for, the management, disposition and investment of the Trust assets, and the Trustee shall comply with proper written directions of the Employer concerning those assets. The Employer shall not issue directions in violation of the terms of the Plan and Trust or prohibited by the laws and Constitution of the State of California and applicable federal laws and regulations. Except to any extent required by the laws and Constitution of the State of California and applicable federal laws and regulations, or otherwise provided in this Trust Agreement, the Trustee shall have no duty or responsibility to review, initiate action, or make recommendations regarding Trust assets and shall retain all such assets until directed in writing by the Employer to dispose of them.
- 2.2 Appointment of Trustee (or Other Individual or Entity) as Investment Manager. The Employer may appoint the Trustee or other appropriately regulated individual or entity as Investment Manager, thereby delegating to the Trustee or other individual or entity the full power, authority and duty to direct the investment and management of all or any portion of the assets of the Trust as specified by the Employer and to the extent provided in Article III, subject to the investment guidelines established by the Employer as provided below. The Employer represents and warrants that any appointment made pursuant to this Section 2.2 complies with the laws and Constitution of the State of California and applicable federal laws and regulations. No appointment and delegation made pursuant to this Section 2.2 shall be effective unless made in writing and signed by both the Trustee and the Employer.
- 2.3 Funding Policy and Investment Guidelines. The Employer shall have the responsibility for establishing and carrying out a funding policy and method, consistent with the objectives of the Plan and, subject to the laws and Constitution of the State of California and applicable federal laws and regulations, taking into consideration the Plan's short-term and long-term financial needs. To the extent that the Trustee is appointed Investment Manager of all or a portion of the assets of the Trust in accordance with Section 2.2 above, the Trustee's responsibility for investment and diversification of such portion of the assets shall be subject to, and is limited by, the investment guidelines issued to it by the Employer in writing. It is understood that, unless otherwise agreed in writing, the Employer, rather than the Trustee, shall be responsible for the overall diversification of Trust assets.

- 2.4 Disposition of Income. During the term of this Trust, all income received by the Trust, net of expenses and taxes, shall be accumulated and reinvested.

### **ARTICLE III**

#### **TRUSTEE'S POWERS**

- 3.1 General Trustee's Powers. Trustee shall have, without exclusion, all powers conferred on Trustees by applicable law, unless expressly provided otherwise herein, provided, however, that if an insurance policy is held as an asset of the Trust, Trustee shall have no power to name a beneficiary of the policy other than the Trust, to assign the policy (as distinct from conversion of the policy to a different form) other than to a successor Trustee, or to loan to any person the proceeds of any borrowing against such policy.
- (a) To invest and reinvest the Trust or any part thereof in any one or more kind, type, class, item or parcel of property, real, personal or mixed, tangible or intangible; or in any one or more kind, type, class, item or issue of investment or security; or in any one or more kind, type class or item of obligation, secured or unsecured; or in any combination of them;
  - (b) To acquire, sell and exercise options to buy securities ("call" options) and to acquire, sell and exercise options to sell securities ("put" options);
  - (c) To buy, sell, assign, transfer, acquire, loan, lease (for any purpose, including beyond the life of this Trust), exchange and in any other manner to acquire, manage, deal with and dispose of all or any part of the Trust property, for cash or credit;
  - (d) To make deposits with any bank or savings and loan institution, including any such facility of the Trustee or an affiliate thereof, provided that the deposit bears a reasonable rate of interest;
  - (e) To retain all or any portion of the Trust in cash temporarily awaiting investment or for the purpose of making distributions or other payments, without liability for interest thereon, notwithstanding the Trustee's receipt of float;
  - (f) To borrow money for the purposes of the Trust from any source other than a party in interest of the Plan, with or without giving security; to pay interest; to issue promissory notes and to secure the repayment thereof by pledging all or any part of the Trust assets;

- (g) To take all of the following actions: to vote proxies of any stocks, bonds or other securities; to give general or special proxies or powers of attorney with or without power of substitution; to exercise any conversion privileges, subscription rights or other options, and to make any payments incidental thereto; to consent to or otherwise participate in corporate reorganizations or other changes affecting corporate securities and to delegate discretionary powers and to pay any assessments or charges in connection therewith; and generally to exercise any of the powers of an owner with respect to stocks, bonds, securities or other property held in the Trust;
- (h) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (i) To pay or cause to be paid from the Trust any and all real or personal property taxes, income taxes or other taxes or assessments of any or all kinds levied or assessed upon or with respect to the Trust or the Plan;
- (j) Subject to the limitations of 3.1, to hold term or ordinary life insurance contracts or to acquire annuity contracts on the lives of Participants (but in the case of conflict between any such contract and a Plan, the terms of the Plan shall prevail); to pay from the Trust the premiums on such contracts; to distribute, surrender or otherwise dispose of such contracts; to pay the proceeds, if any, of such contracts to the proper persons in the event of the death of the insured Participant; to enter into, modify, renew and terminate annuity contracts of deposit administration, of immediate participation or other group or individual type with one or more insurance companies and to pay or deposit all or any part of the Trust thereunder; to provide in any such contract for the investment of all or any part of funds so deposited with the insurance company in securities under separate accounts; to exercise and claim all rights and benefits granted to the contract holder by any such contracts. All payments and exercise of all powers with respect to insurance contracts shall be solely on the direction of Employer;
- (k) To exercise all the further rights, powers, options and privileges granted, provided for, or vested in trustees generally under applicable federal or state laws, as amended from time to time, it being intended that, except as otherwise provided in this Trust, the powers conferred upon the Trustee herein shall not be construed as being in limitation of any authority conferred by law, but shall be construed as in addition thereto.

- (l) Notwithstanding any powers granted to Trustee pursuant to this Trust Agreement or to applicable law, Trustee shall not have any power that could give this Trust the objective of carrying on a business and dividing the gains therefrom, within the meaning of section 301.7701-2 of the Procedure and Administrative Regulations promulgated pursuant to the Internal Revenue Code.

3.2 Additional Powers. In addition to the other powers enumerated above, the Trustee is authorized and empowered:

- (a) To invest funds in any type of interest-bearing account including, without limitation, time certificates of deposit or interest-bearing accounts issued by UNION BANK, N.A. To use other services or facilities provided by the UnionBanCal Corporation (UNBC), its subsidiaries or affiliates including Union Bank, N.A. (Bank), to the extent allowed by applicable law and regulation. Such services may include but are not limited to (1) the placing of orders for the purchase, exchange, investment or reinvestment of securities through any brokerage service conducted by, and (2) the purchase of units of any registered investment company managed or advised by Bank, UNBC, or their subsidiaries or affiliates and/or for which Bank, UNBC or their subsidiaries or affiliates act as custodian or provide other services for a fee, including, without limitation, the HighMark Group of mutual funds. The parties hereby acknowledge that the Bank may receive fees for such services in addition to the fees payable under this Agreement. Fee schedules for additional services shall be delivered to the appropriate party in advance of the provision of such services. Independent fiduciary approval of compensation being paid to the Bank will be sought in advance to the extent required under applicable law and regulation.

If Union Bank, N.A. does not have investment discretion, the services referred to above, as well as any additional services, shall be utilized only upon the appropriate direction of an authorized party.

- (b) To cause all or any part of the Trust to be held in the name of the Trustee (which in such instance need not disclose its fiduciary capacity) or, as permitted by law, in the name of any nominee, including the nominee name of any depository, and to acquire for the Trust any investment in bearer form; but the books and records of the Trust shall at all times show that all such investments are a part of the Trust and the Trustee shall hold evidences of title to all such investments as are available;

- (c) To serve as custodian with respect to the Trust assets, to hold assets or to hold eligible assets at the Depository Trust Company or other depository;
- (d) To employ such agents and counsel as may be reasonably necessary in administration and protection of the Trust assets and to pay them reasonable compensation; to employ any broker-dealer covered in the self-dealing section, and pay to such broker-dealer its standard commissions; to settle, compromise or abandon all claims and demands in favor of or against the Trust; and to charge any premium on bonds purchased at par value to the principal of the Trust without amortization from the Trust, regardless of any law relating thereto;
- (e) To abandon, compromise, contest, arbitrate or settle claims or demands; to prosecute, compromise and defend lawsuits, but without obligation to do so, all at the risk and expense of the Trust;
- (f) To permit such inspections of documents at the principal office of the Trustee as are required by law, subpoena or demand by United States or state agency during normal business hours of the Trustee;
- (g) To comply with all requirements imposed by law;
- (h) To seek written instructions from the Employer on any matter and await written instructions without incurring any liability. If at any time the Employer should fail to give directions to the Trustee, the Trustee may act in the manner that in its discretion it deems advisable under the circumstances for carrying out the purposes of this Trust. Such actions shall be conclusive on the Employer and the Participants on any matter if written notice of the proposed action is given to Employer five (5) days prior to the action being taken, and the Trustee receives no response;
- (i) To compensate such executive, consultant, record keeper, actuarial, accounting, investment, appraisal, administrative, clerical, secretarial, custodial, depository and legal firms, personnel and other employees or assistants as are engaged by the Employer in connection with the administration of the Plan and to pay from the Trust the necessary expenses of such firms, personnel and assistants, to the extent not paid by the Employer;
- (j) To impose a reasonable charge to cover the cost of furnishing to Participants statements or documents;
- (k) To act upon proper written directions of the Employer or any Participant including directions given by photostatic teletransmission

using facsimile signature. If oral instructions are given, to act upon those in Trustee's discretion prior to receipt of written instructions. Trustee's recording or lack of recording of any such oral instructions taken in Trustee's ordinary course of business shall constitute conclusive proof of Trustee's receipt or non-receipt of the oral instructions;

- (l) To pay from the Trust the expenses reasonably incurred in the administration of the Trust;
  - (m) To maintain insurance for such purposes, in such amounts and with such companies as the Employer shall elect, including insurance to cover liability or losses occurring by reason of the acts or omissions of fiduciaries (but only if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary);
  - (n) As directed by the Employer, to cause the benefits provided under the Plan to be paid directly to the persons entitled thereto under the Plan, and in the amounts and at the times and in the manner specified by the Plan, and to charge such payments against the Trust and Accounts with respect to which such benefits are payable;
  - (o) To exercise and perform any and all of the other powers and duties specified in this Trust Agreement or the Plan; and in addition to the powers listed herein, to do all other acts necessary or desirable for the proper administration of the Trust, as though the absolute owner thereof.
- 3.3 Delegatee. The Employer may delegate certain authority, powers and duties to an entity to act in those matters specified in the delegation ("Delegatee"). Any such delegation must be in a writing that names and identifies the Delegatee, states the effective date of the delegation, specifies the authority and duties delegated, is executed by the Employer and is acknowledged in writing by the Delegatee, the Trust Administrator (if not the Delegatee) and the Trustee. Such delegation shall be effective until the Trustee and the Trust Administrator are directed in writing by the Employer that the delegation has been rescinded or modified.
- 3.4 Directions to Trustee. Except as otherwise provided in this Trust Agreement, all directions to the Trustee from the Employer or Delegatee must be in writing and must be signed by the Employer or Delegatee, as the case may be. For all purposes of this Trust Agreement, direction shall include any certification, notice, authorization, application or instruction of the Employer, Delegatee or Trustee appropriately communicated. The above

notwithstanding direction may be implied if the Employer or Delegatee has knowledge of the Trustee's intentions and fails to file written objection.

The Trustee shall have the power and duty to comply promptly with all proper direction of the Employer, or Delegatee, appointed in accordance with the provisions of this Trust Agreement. In the case of any direction deemed by the Trustee to be unclear or ambiguous the Trustee may seek written instructions from the Employer, the Agency or the Delegatee on such matter and await their written instructions without incurring any liability. If at any time the Employer or the Delegatee should fail to give directions to the Trustee, the Trustee may act in the manner that in its discretion seems advisable under the circumstances for carrying out the purposes of the Trust Program and/or any Agency Trust which may include not taking any action. The Trustee may request directions or clarification of directions received and may delay acting until clarification is received. In the absence of timely direction or clarification, or if the Trustee considers any direction to be a violation of the Trust Agreement or any applicable law, the Trustee shall in its sole discretion take appropriate action, or refuse to act upon a direction.

3.5 Trust Administrator. The Employer has appointed PARS as the Trust Administrator. The Trust Administrator has accepted its appointment subject to the Employer's delegation of authority, to act as such, pursuant to Section 3.3 of this Trust Agreement. The Trust Administrator's duties involve the performance of the following services pursuant to the provisions of this trust agreement and the Agreement for Administrative Services:

- (a) Performing periodic accounting of the Agency Trust;
- (b) Directing the Trustee to make distributions from the Agency Trust to Participants pursuant to the provisions of the Plan and liquidate assets in order to make such distributions;
- (c) Notifying the Investment Fiduciary of the amount of Assets in the Agency Trust available for further investment and management by the Investment Fiduciary;
- (d) Allocating contributions, earnings and expenses to each Agency Trust;
- (e) Directing the Trustee to pay insurance premiums, to pay the fees of the Trust Administrator and to do such other acts as shall be appropriate to carry out the intent of the Agency Trusts.
- (f) Such other services as the Employer and the Trust Administrator may agree.

- 3.6 Additional Trust Administrator Services. The Employer may at any time retain the Trust Administrator as its agent to perform any act, keep any records or accounts and make any computations which are required of the Employer by this Trust Agreement or by the Plan. The Trust Administrator shall be separately compensated for such service and such services shall not be deemed to be contrary to the Trust Agreement.
- 3.7 Trust Administrator's Compensation. As may be agreed upon from time to time by the Employer and Trust Administrator, the Trust Administrator will be paid reasonable compensation for services rendered or reimbursed for expenses properly and actually incurred in the performance of duties.
- 3.8 Resignation or Removal of Trust Administrator. The Trust Administrator may resign at any time by giving at least one hundred twenty (120) days written notice to the Employer and the Trustee.

#### ARTICLE IV

##### TRUSTEE AND EMPLOYER DUTIES

- 4.1 Legal Duties. The Trustee and Employer shall exercise any of the foregoing powers from time to time as required by law.
- 4.2 Payments to Participants.
- (a) Employer shall deliver to Trustee a schedule (the "Payment Schedule") that indicates the amounts payable in respect of each Participant, that provides a formula or other instructions acceptable to Trustee for determining the amount so payable, the form in which such amount is to be paid (as provided for or available under the Plan), and the time of commencement for payment of such amounts. Except as otherwise provided herein, Trustee shall make payments to the Participants in accordance with such Payment Schedule. As directed by Employer, the Trustee shall make provision for the reporting and withholding of any federal, state or local taxes that may be required to be withheld with respect to the payment of benefits pursuant to the terms of the Plan and shall pay amounts withheld to the appropriate taxing authorities or determine that such amounts have been reported, withheld and paid by Employer.
- (b) The entitlement of a Participant to benefits under the Plan shall be determined by Employer or such party as it shall designate under the Plan, and any claim for such benefits shall be considered and reviewed under the procedures set out in the Plan.

- (c) Employer may make payment of benefits directly to Participants as they become due under the terms of the Plan. Employer shall notify Trustee of its decision to make payment of benefits directly prior to the time amounts are payable to Participants. In addition, if the principal of the Trust, and earnings thereon, are not sufficient to make payments of benefits in accordance with the terms of the Plan, Employer shall make the balance of each such payment as it falls due. Trustee shall notify Employer where principal and earnings are not sufficient. Trustee shall have no duty or obligation to enforce or compel Employer to make payments hereunder. Employer may direct Trustee to reimburse Employer for payments made directly by Employer to Participants, and shall provide the Trustee with such documentation to evidence those direct payments as the Trustee may reasonably request.
- (1) In the event payments are made by Employer directly to Participants, Employer shall have sole responsibility for the reporting and withholding of any federal, state, or local taxes that may be required to be withheld with respect to the payment of benefits pursuant to the terms of the Plan and shall pay amounts withheld to the appropriate taxing authority.
  - (2) Trustee shall have no duty or responsibility with respect to the above stated reporting, withholding or payment of taxes and shall have no responsibility to determine that Employer has provided for such reporting, withholding or payment of such taxes.
  - (3) Employer shall indemnify and hold Trustee harmless from any and all losses, claims, penalties or damages which may occur as a result of Trustee following in good faith the written direction of the Employer to reimburse Employer for payments made hereunder to Participants and arising from Employer's tax reporting, withholding and payment obligations hereunder.
- (d) Upon the satisfaction of all liabilities of the Employer under the Plan to all Participants the Trustee shall hold or distribute the Trust in accordance with the written instructions of the Employer. Except as provided in (c) above, at no time prior to the Employer's Insolvency, as defined in Article XI, or the satisfaction of all liabilities of the Employer under the Plan in respect of all Participants having Accounts hereunder shall any part of the Trust revert to the Employer.

4.3 Accounts and Records. The Trustee shall keep accurate and detailed records of all investments, receipts, disbursements and all other transactions required to be done, including such specific records as shall be agreed upon

in writing between the Employer and the Trustee. All such accounts, books and records shall be open to inspection and audit at all reasonable times by the Employer and by the Participants. Within sixty (60) days after the close of each quarter and Plan year and within sixty (60) days after the resignation or removal of the Trustee as provided in Article VI hereof, the Trustee shall render to the Employer a written account showing in reasonable summary the investments, receipts, disbursements and other transactions engaged in by the Trustee during the preceding Plan Year or accounting period with respect to the Trust. Such account shall set forth the assets and liabilities of the Trust. The Employer shall have ninety (90) days after the Trustee's mailing of each such quarterly or final account within which to file with the Trustee written objections to such account. Upon approval or by failure to file with the Trustee written objections to such account within the 90-day period, the Employer shall release and discharge the Trustee from all liability and accountability to the Employer as to all matters and items set forth in such account as if such account had been settled and allowed by a decree from a court of competent jurisdiction, such settlement and allowance to be final and binding.

Notwithstanding anything herein to the contrary, the Trustee shall have no duty or responsibility to obtain valuations of any assets of the Trust Fund, the value of which is not readily determinable on an established market. Employer shall bear sole responsibility for determining said valuations and shall be responsible for providing said valuations to Trustee in a timely manner. Trustee may conclusively rely on such valuations provided by Employer and shall be indemnified and held harmless by Employer with respect to such reliance.

- 4.4 Reports. The Trustee shall file such descriptions and reports and shall furnish such information and make such other publications, disclosures, registrations and other filings as are required of the Trustee by law. The Trustee shall have no responsibility to file reports or descriptions, publish information or make disclosures, registrations or other filings unless directed by the Employer.
- 4.5 Follow Employer Direction. The Trustee shall have the power and duty to comply promptly with all proper directions of the Employer.
- 4.6 Information to be Provided to Trustee. The Employer shall maintain and furnish the Trustee with all reports, documents and information as shall be required by the Trustee to perform its duties and discharge its responsibilities under this Trust Agreement, including without limitation a certified copy of each of the Plan and all amendments thereto.

The Trustee shall be entitled to rely on the most recent reports, documents and information furnished to it by the Employer. The Employer shall be

required to notify the Trustee as to the termination of employment of any Participant by death, retirement or otherwise.

The Employer shall arrange for each Investment Manager if appointed pursuant to Section 2.2, and each insurance company issuing contracts held by the Trustee pursuant to Section 3.1(j), to furnish the Trustee with such valuations and reports as are necessary to enable the Trustee to fulfill its obligations under this Trust Agreement, and the Trustee shall be fully protected in relying upon such valuations and reports.

## ARTICLE V

### RESTRICTIONS ON TRANSFER

#### 5.1 Persons to Receive Payment.

- (a) The Trustee shall, except as otherwise provided in section 4.2(d) and subsection (b) hereunder, pay all amounts payable hereunder only to the person or persons designated under the Plan or deposit such amounts to the Participant's checking or savings account as directed by the Employer and not to any other person or corporation, and only to the extent of assets held in the Trust, and shall follow written instructions by the Employer. The Employer's written instructions, to the Trustee to make distributions or not to make distributions, and the amount thereof, shall be conclusive on all Participants.
- (b) Should any controversy arise as to the person or persons to whom any distribution or payment is to be made by the Trustee, or as to any other matter arising in the administration of the Plan or Trust, the Trustee may retain the amount in controversy pending resolution of the controversy or the Trustee may file an action seeking declaratory relief and/or may interplead the Trust assets in issue, and name as necessary parties the Employer, the Participants and/or any or all persons making conflicting demands.
- (c) The Trustee shall not be liable for the payment of any interest or income, except for that earned as a Trust investment, on any amount withheld or interpleaded under subsection (b).
- (d) The expense of the Trustee for taking any action under subsection (b) shall be paid to the Trustee from the Trust.

#### 5.2 Assignment and Alienation Prohibited. Benefits payable to Participants under this Trust Agreement may not be anticipated, assigned (either at law or in equity), alienated, pledged, encumbered or subjected to attachment,

garnishment, levy, execution or other legal or equitable process. Notwithstanding the foregoing, the Trust shall at all times remain subject to the claims of creditors of the Employer in the event the Employer becomes Insolvent as provided in Article XI.

## ARTICLE VI

### **RESIGNATION, REMOVAL AND SUCCESSION**

6.1 Resignation or Removal of Trustee. Trustee may resign at any time by written notice to the Employer, which shall be effective thirty (30) days after receipt of such notice unless Employer and Trustee agree otherwise. The Employer may remove the Trustee at any time by written notice to the Trustee, which shall be effective thirty (30) days after receipt of such notice unless the Trustee and Employer otherwise agree.

6.2 Designation of Successor. Upon notice of the Trustee's resignation or removal, the Employer shall promptly designate a successor Trustee who will accept transfer of the assets of the Trust.

If no successor Trustee is designated within thirty (30) days of notice of Trustee's resignation or removal, then the Trustee may apply to a court of competent jurisdiction for appointment of a successor or instructions as provided in Section 6.4 below.

6.3 Upon resignation or removal of Trustee and appointment of a successor Trustee, all assets shall subsequently be transferred to the successor Trustee. The transfer shall be completed as soon as administratively feasible after receipt of notice of resignation, removal or transfer and appointment of and acceptance by successor Trustee, unless Employer extends the time limit.

6.4 Court Appointment of Successor. If Trustee resigns or is removed, a successor shall be appointed, in accordance with Section 6.2 hereof, by the effective date of resignation or removal under paragraph 6.1 of this section. If no such appointment has been made, Trustee may apply to a court of competent jurisdiction for appointment of a successor or for instructions. All expenses of Trustee in connection with the proceeding shall be allowed as administrative expenses of the Trust. Until a successor Trustee has accepted its appointment and received transfer of the Trust assets, the Trustee shall be entitled to be compensated for its services according to its published fee schedule then in effect for acting as Trustee.

6.5 Successor's Powers. A successor Trustee shall have the same powers and duties as those conferred upon the original Trustee hereunder. A resigning

Trustee shall transfer the Trust assets and shall deliver the assets of the Trust to the successor Trustee as soon as practicable. The resigning Trustee is authorized, however, to reserve such amount as may be necessary for the payment of its fees and expenses incurred prior to its resignation, and the Trust assets shall remain liable to reimburse the resigning Trustee for all fees and costs, expenses or attorneys' fees or losses incurred, whether before or after resignation, due solely to Trustee's holding title to and administration of Trust assets.

- 6.6 Successor's Duties. A successor Trustee shall have no duty to audit or otherwise inquire into the acts and transactions of its predecessor.

## **ARTICLE VII**

### **AMENDMENT**

- 7.1 Power to Amend. This Trust Agreement may be amended by a written instrument executed by Trustee and Employer. No such amendment shall conflict with the terms of the Plan.

## **ARTICLE VIII**

### **LIABILITIES**

- 8.1 Declaration of Intent. To the full extent permitted by law, it is the intent of this Article to relieve each fiduciary from all liability for any acts or omissions of any other fiduciary or any other person and to declare the absence of liabilities of all persons referred to in this Article to the extent not imposed by law or by provisions of this Trust Agreement. Each of the following Sections, in declaring such limitation, is set forth without limiting the generality of this Section but in each case shall be subject to the provisions, limitations and policies set forth in this Section.

- 8.2 Liability of the Trustee.

- (a) The Trustee shall have no powers, duties or responsibilities with regard to the administration of the Plan or to determine the rights or benefits of any person having or claiming an interest under the Plan or in the Trust or under this Trust Agreement or to examine or control any disposition of the Trust or part thereof which is directed by the Employer, as applicable.
- (b) The Trustee shall have no liability for the adequacy of contributions for the purposes of the Plan or for enforcement of the payment thereof.

- (c) The Trustee shall have no liability for the acts or omissions of the Employer or Fiduciaries.
- (d) The Trustee shall have no liability for following proper directions of Employer or Employer's designated Fiduciaries, or any Participant when such directions are made in accordance with this Trust Agreement and the Plan.
- (e) During such period or periods of time, if any, as Employer or Investment Manager (collectively, "Fiduciary") is directing the investment and management of Trust assets, the Trustee shall have no obligation to determine the existence of any conversion, redemption, exchange, subscription or other right relating to any securities purchased on the directions of such Fiduciary if notice of any such right was given prior to the purchase of such securities. If such notice is given after the purchase of such securities, the Trustee shall notify such Fiduciary. The Trustee shall have no obligation to exercise any such right unless it is instructed to exercise such right, in writing, by the Fiduciary within a reasonable time prior to the expiration of such right.
- (f) During such period or periods of time, if any, as a Fiduciary is directing the investment and management of Trust assets, if such Fiduciary directs the Trustee to purchase securities issued by any foreign government or agency thereof, or by any corporation domiciled outside of the United States, it shall be the responsibility of the Fiduciary to advise the Trustee in writing with respect to any laws or regulations of any foreign countries or any United States territories or possessions which shall apply, in any manner whatsoever, to such securities, including, but not limited to, receipt of dividends or interest by the Trustee for such securities.

### 8.3 Indemnification.

- (a) The Trustee shall not be liable for, and Employer shall indemnify, defend, and hold the Trustee (including its officers, agents, employees and attorneys) harmless from and against any claims, demands, loss, costs, expense or liability imposed on the indemnified party, including reasonable attorneys' fees and costs incurred by the indemnified party, arising as a result of (1) any acts taken by the Trustee in accordance with directions (or failure to act in the absence of directions) from the Employer, Investment Manager or any other person or entity authorized to act on their behalf which the Trustee reasonably believes to have been given by them, or (2) the Employer's active or passive

negligent act or omission or willful misconduct in the execution or performance of its duties under this Trust Agreement.

- (b) The Employer shall not be liable for, and Trustee shall indemnify, defend, and hold the Employer (including its officers, agents, employees and attorneys) harmless from and against any claims, demands, loss, costs, expense or liability imposed on the indemnified party, including reasonable attorneys' fees and costs incurred by the indemnified party, arising as a result of Trustee's active or passive negligent act or omission or willful misconduct in the execution or performance of its duties under this Trust Agreement.
- (c) Promptly after receipt by an indemnified party of notice or receipt of a claim or the commencement of any action for which indemnification may be sought, the indemnified party will notify the indemnifying party in writing of the receipt or commencement thereof. When the indemnifying party has agreed to provide a defense as set out above that party shall assume the defense of such action (including the employment of counsel, who shall be counsel satisfactory to such indemnitee) and the payment of expenses, insofar as such action shall relate to any alleged liability in respect of which indemnity may be sought against the indemnifying party. Any indemnified party shall have the right to employ separate counsel in any such action and to participate in the defense thereof, but the fees and expenses of such counsel shall not be at the expense of the indemnifying party unless (i) the employment of such counsel has been specifically authorized by the indemnifying party or (ii) the named parties to any such action (including any impleaded parties) include both the indemnifying party and the indemnified party and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interest between them. The indemnifying party shall not be liable to indemnify any person for any settlement of any such action effected without the indemnifying party's consent.

## ARTICLE IX

### **DURATION, TERMINATION AND REPAYMENTS TO EMPLOYER**

- 9.1 Revocation and Termination. The Trust shall not terminate until the date on which Participants are no longer entitled to benefits pursuant to the terms of the Plan, unless sooner revoked in accordance with Section 1.2 hereof. Upon termination of the Trust any assets remaining in the Trust shall be returned to Employer. In the event the Trust is terminated following the distribution of all payments and benefits called for herein, from the date of such termination of the Trust and until the final distribution of the remaining Trust assets, if any,

the Trustee shall continue to have all the powers provided under this Trust Agreement that are necessary or desirable for the orderly liquidation and distribution of the Trust.

- 9.2 Duration. This Trust shall continue in full force and effect for the maximum period of time permitted by law and in any event until the expiration of twenty-one years after the death of the last surviving person who was living at the time of execution hereof who at any time becomes a Participant in the Plan, unless this Trust is sooner terminated in accordance with this Trust Agreement.

## ARTICLE X

### MISCELLANEOUS

#### 10.1 Emergencies and Delegation.

- (a) In case of an emergency, the Trustee may act in the absence of directions from any other person having the power and duty to direct the Trustee with respect to the matter involved and shall incur no liability in so acting.
- (b) By written notice to the Trustee, the Employer may authorize the Trustee to act on matters in the ordinary course of the business of the Trust or on specific matters upon the signature of its delegate.

#### 10.2 Expenses and Taxes.

- (a) The Employer, or at its option, the Trust, shall quarterly pay the Trustee its expenses in administering the Trust and reasonable compensation for its services as Trustee at a rate to be agreed upon by the parties to this Trust Agreement, based upon Trustee's published fee schedule. However, the Trustee reserves the right to alter this rate of compensation at any time by providing the Employer with notice of such change at least thirty (30) days prior to its effective date. Reasonable compensation shall include compensation for any extraordinary services or computations required, such as determination of valuation of assets when current market values are not published and interest on funds to cover overdrafts. The Trustee shall have a lien on the Trust for compensation and for any reasonable expenses including counsel, appraisal, or accounting fees, and these shall be withdrawn from the Trust and may be reimbursed by the Employer.
- (b) Reasonable counsel fees, reasonable costs, expenses and charges of the Trustee incurred or made in the performance of its duties,

expenses relating to investment of the Trust such as broker's commissions, stamp taxes, and similar items and all taxes of any and all kinds that may be levied or assessed under existing or future laws upon or in respect to the Trust or the income thereof, and the Trustee's charges for issuing distribution checks to Participants or their representatives shall be paid from, and shall constitute a charge upon the Trust.

- (c) In the event any Participant is determined to be subject to federal income tax on any amount under this Trust Agreement prior to the time of payment hereunder, the entire amount determined to be so taxable shall, at the Employer's direction, be distributed by the Trustee to such Participant from the Trust. For the above purposes, a Participant shall be determined to be subject to federal income tax with respect to the Trust upon the earlier of: (a) a final determination by the United States Internal Revenue Service ("IRS") addressed to the Participant which is not appealed to the courts; (b) an opinion of legal counsel designated in writing by the Employer, addressed to the Employer and the Trustee, that, by reason of Treasury Regulations, amendments to the Code, published IRS rulings, court decisions or other substantial precedent, amounts hereunder subject the Participant to federal income tax prior to payment. The Employer shall undertake at its discretion and at its sole expense to defend any tax claims described herein which are asserted by the IRS against any Participant, including attorney fees and costs of appeal, and shall have the sole authority to determine whether or not to appeal any determination made by the IRS or by a lower court. The Employer also agrees to reimburse any Participant under this Section for any interest or penalties in respect of tax claims hereunder upon receipt of documentation thereof.

### 10.3 Third Parties.

- (a) No person dealing with the Trustee shall be required to follow the application of purchase money paid or money loaned to the Trustee nor inquire as to whether the Trustee has complied with the requirements hereof.
- (b) In any judicial or administrative proceedings, only the Employer and the Trustee shall be necessary parties and no Participant or other person having or claiming any interest in the Trust shall be entitled to any notice or service of process (except as required by law). Any judgment, decision or award entered in any such proceeding or action shall be conclusive upon all interested persons.

### 10.4 Adoption by Affiliated Employer. Any affiliate of the Employer (an "Affiliated Employer") may adopt one or more of the Employer's Plans with the approval

- of the Employer, and the Affiliated Employer shall concurrently become a party to this Trust Agreement by giving written notice of its adoption of the Plan and this Trust Agreement to the Trustee. Upon such written notice, the Affiliated Employer shall become a signatory to this Trust Agreement.
- 10.5 Binding Effect; Successor Employer. This Trust Agreement shall be binding upon and inure to the benefit of any successor to the Employer or its business as the result of merger, consolidation, reorganization, transfer of assets or otherwise and any subsequent successor thereto. In the event of any such merger, consolidation, reorganization, transfer of assets or other similar transaction, the successor to the Employer or its business or any subsequent successor thereto shall promptly notify the Trustee in writing of its successorship and shall promptly supply information required by the Trustee.
- 10.6 Relation to Plan. All words and phrases used herein shall have the same meaning as in the Plan, and this Trust Agreement and the Plan shall be read and construed together. In the event of any conflict between the terms of the Plan and this Trust Agreement with respect to the rights and duties of the Trustee, this Trust Agreement shall control. Whenever in the Plan it is provided that the Trustee shall act as therein prescribed, the Trustee shall be and is hereby authorized and empowered to do so for all purposes as fully as though specifically so provided herein or so directed by the Employer.
- 10.7 Mediation and Arbitration of Disputes. If a dispute arises under this Trust Agreement between or among the Employer and Trustee or any Participant, except as provided in Sections 5.1(b) and 6.4, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association. Thereafter, any remaining unresolved controversy or claim arising out of or relating to this Agreement, or the performance or breach thereof, shall be decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and Title 9 of California Code of Civil Procedure Sections 1280 et seq. The sole arbitrator shall be a retired or former Judge associated with the American Arbitration Association. Judgement upon any award rendered by the arbitrator shall be final and may be entered in any court having jurisdiction. Each party shall bear its own costs, attorney's fees and its share of arbitration fees. The Alternate Dispute Resolution Agreement in this Agreement does not constitute a waiver of the parties' rights to a judicial forum in instances where arbitration would be void under applicable law, and does not preclude Bank from exercising its rights to interplead the funds of the Account at the cost of the Account.
- 10.8 Attorney Fees and Costs. If any action is brought by the Trustee or the Employer against the other in a court of law in order to compel arbitration pursuant to Section 10.7 above, the prevailing party in such proceeding to

compel arbitration shall be entitled to recover from the other party reasonable attorneys' fees, court costs and necessary disbursements incurred in connection with such proceeding, including but not limited to copying costs, filing fees, expert costs and fees and word processing fees.

- 10.9 Partial Invalidity. Any provision of this Trust Agreement prohibited by law shall be ineffective to the extent of any such prohibition, without invalidating the remaining provisions hereof. In the event of any such holding, the Employer and Trustee and, if applicable, Participants, will immediately amend this Trust Agreement as necessary to remedy any such defect.
- 10.10 Construction. This Trust Agreement shall be governed by and construed in accordance with the laws of California.
- 10.11 Notices. Any notice, report, demand or waiver required or permitted hereunder shall be in writing, shall be deemed received upon the date of delivery if given personally or, if given by mail, upon the receipt thereof, and shall be given personally or by prepaid registered or certified mail, return receipt requested, addressed to Employer and Trustee as listed below in Article XII; if to a Participant, to the last mailing address provided to the Trustee with respect to such individual, provided, however, that if any party or his or its successor shall have designated a different address by written notice to the other parties, then to the last address so designated.

## ARTICLE XI

### DISTRIBUTIONS IN THE EVENT OF INSOLVENCY OF EMPLOYER

- 11.1 Trustee and Employer Responsibility upon notice of Employer's Insolvency:
- (a) Insolvency. Trustee shall cease payment of benefits to Participants if the Employer is Insolvent. Employer shall be considered "Insolvent" for purposes of this Trust Agreement if (i) Employer is unable to pay its debts as they become due, or (ii) Employer is subject to a pending proceeding as a debtor under the United States Bankruptcy Code.
  - (b) At all times during the continuance of this Trust, as provided in Section 1.4 hereof, the principal and income of the Trust shall be subject to claims of general creditors of Employer under federal and state law as set forth below.
    - (1) The Governing Board and the Plan Administrator designated by the Employer shall have the duty to inform Trustee in writing of Employer's Insolvency. If a person claiming to be a creditor of Employer alleges in writing to Trustee that Employer has

become Insolvent, Trustee shall determine whether Employer is Insolvent and, pending such determination, Trustee shall discontinue payment of benefits to Participants. If Trustee is unable to obtain information sufficient to ascertain Insolvency, Trustee may seek instructions of a court of law or submit the matter for arbitration before the American Arbitration Association or interplead the Trust Assets at the expense of the Trust.

- (2) Unless Trustee has actual knowledge of Employer's Insolvency, or has received written notice from Employer or a person claiming to be a creditor alleging that Employer is Insolvent, Trustee shall have no duty to inquire whether Employer is Insolvent. Trustee may in all events rely on such evidence concerning Employer's solvency as may be furnished to Trustee and that provides Trustee with a reasonable basis for making a determination concerning Employer's solvency.
  - (3) If at any time Trustee has determined that Employer is Insolvent, Trustee shall discontinue payments to Participants and shall hold the assets of the Trust for the benefit of Employer's general creditors. Nothing in this Trust Agreement shall in any way diminish any rights of Participants to pursue their rights as general creditors of Employer with respect to benefits due under the Plan or otherwise.
  - (4) Trustee shall resume the payment of benefits to Participants in accordance with Section 4.2 of this Trust Agreement only after Trustee has determined that Employer is not Insolvent (or is no longer Insolvent).
- (c) Determination of Insolvency. Upon receipt of the aforesaid written notice of the Employer's Insolvency, the Trustee shall notify the Employer, and the Employer, within thirty (30) days of receipt of such notice, shall engage an arbitrator (the "Arbitrator") acceptable to Trustee, from the American Arbitration Association to determine the Employer's solvency or Insolvency. The Employer shall cooperate fully and assist the Arbitrator, as may be requested by the Arbitrator, in such determination and shall pay all costs relating to such determination. The Arbitrator shall notify the Employer and Trustee separately by registered mail of its findings. If the Arbitrator determines that the Employer is solvent or if once found Insolvent the Employer is no longer Insolvent, the Trustee shall resume holding the Trust assets for the benefit of the Participants and may make any distributions called for under this Trust Agreement, including any amounts which should have been distributed during the period when

the Trustee suspended distributions in response to a notice of the Employer's Insolvency, including earnings (or losses) on such suspended distributions. If the Arbitrator determines that the Employer is Insolvent or is unable to make a conclusive determination of the Employer's Insolvency, the Trustee shall continue to retain the assets of the Trust until the Employer's status of solvency or Insolvency is decided by a court of competent jurisdiction or it distributes all or a portion of the Trust assets to any duly appointed receiver, trustee in bankruptcy, custodian or to the Employer's general creditors, but only as such distribution is ordered by a court of competent jurisdiction.

The Trustee shall have no liability for relying upon the determination of the Arbitrator as to the Employer's solvency or Insolvency.

- (d) If a court of competent jurisdiction orders distribution of only part of the Trust assets and does not specify the manner in which Trust assets are to be liquidated, the Trustee shall liquidate Trust assets as directed by the Employer.

If the Employer fails to provide instructions as to the manner of liquidation within five (5) business days prior to the date the Trustee is required to comply with the court's order, the Trustee shall liquidate and shall have the authority to order any Investment Manager to liquidate the Trust assets in such manner as the Trustee shall determine in its sole and absolute discretion. The Trustee shall not be liable for any damages resulting from the Trustee's exercise in good faith of its power to liquidate assets as provided in this paragraph.

- (e) Provided that there are sufficient assets, if Trustee discontinues the payment of benefits from the Trust pursuant to subsection (b)(3) hereof and subsequently resumes such payments, the first payment following such discontinuance shall include the aggregate amount of all payments due to Participants under the terms of the Plan for the period of such discontinuance, less the aggregate amount of any payments made to Participants by Employer in lieu of the payments provided for hereunder during any such period of discontinuance of which Trustee has actual knowledge.

Nothing in this Trust Agreement shall in any manner diminish any right of a Participant to pursue his or her rights as a general creditor of the Employer with regard to payments under the Trust or otherwise.

**ARTICLE XII**

**EFFECTIVE DATE**

This Trust Agreement shall be effective upon the Trustee's receipt of assets to be held in trust hereunder, and is signed by the parties on the date(s) set forth below their names.

UNION BANK, N.A.

\_\_\_\_\_  
(Address)

\_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
(typed or printed name)

Date: \_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
(typed or printed name)

Date: \_\_\_\_\_

City of Torrance  
"Employer", Sponsor of the Trustee

City of Torrance PARS Replacement  
Benefit Program  
(Plan)

3031 Torrance Boulevard  
(Address)

Torrance, CA 90509

By: \_\_\_\_\_

Dana Cortez, City Treasurer  
(typed or printed name, title)

Date: \_\_\_\_\_

THE TRUST ADMINISTRATOR

PUBLIC AGENCY RETIREMENT  
SERVICES

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_